Does Price Fixing Destroy Liberty?

A Consideration of Certain Economic and Common Law Principles Applying to Governmental Interferences with the Liberty of Trade

By

George H. Earle, Jr.

of the

PHILADELPHIA BAR

Philadelphia

1920

Does Price Fixing Destroy Liberty?

A Consideration of Certain Economic and Common Law Principles Applying to Governmental Interferences with the Liberty of Trade

By

GEORGE H. EARLE, JR.,

OF THE

PHILADELPHIA BAR

Philadelphia

1920

The Author gratefully acknowledges
the valuable editorial
assistance of

H. Edgar Barnes, Esq.,

and

John A. McCarthy, Esq.,

of the Philadelphia Bar

TABLE OF CONTENTS.

INTRODUCTION.

Defense of Freedom requires no apology; but, were it otherwise, ample excuse for this Essay is obvious from what we see about us.

Men are pleading guilty, paying enormous fines, in some jurisdictions, whilst, in others, it is constantly decided that identical conduct constitutes no offense.

One even sees those who, having taken great risks most helpful to trade, indignantly deny it, because of the undefined terrors of the Lever Act. Every business man is constantly seeking what he may or may not lawfully do:—with no possibility of adequate answer; the freedom and courage requisite for large production, a deficiency in which prompted the Act, are being more and more discouraged. All history teaches that but few will face a possible jail term, with its accompanying disgrace, whilst nearly all will encounter even death for their love of Liberty. In all England but four Knights could be found courageous enough to join with John Hampden in facing the danger of refusing to pay ship-money, although they were saving the principles upon which our liberties still rest; whilst Cromwell had no difficulty in recruiting his invincible Army. Nothing is so terrorizing as the unknown; for, to real danger, are added all the fears that may be conjured by overwrought imagination.

But what is of compelling importance is that mistake in the economic law may as greatly endanger Freedom as error in Civil Law; and that an examination of the decisions so far rendered in our Federal Courts, touching the Lever Act (with the exception of those of the Supreme Court upon kindred subjects),

discloses a complete lack of inquiry into the economic law of the case, the necessity of which Mr. Justice Holmes has pointed out in the Harvester and Northern Securities cases, as referred to hereinafter.

The result has been that the lower Courts have had difficulty in reconciling the decisions of the Supreme Court in the *Nash*[1] case and the *International Harvester* case,[2] although economic law entirely vindicates the results reached by the Supreme Court in both cases. The present purpose, therefore, is to inquire into this vital though neglected part of the subject; to call attention to the economic truths that money and credit fluctuate as much, and often more, than commodities; again to point out that continuing trade is, in substance, only *its original form of barter;* to show that an exchange of a commodity for money constitutes but *a single step,* the second and most vital step being the replacement of the commodity with the money thus obtained. That this second step is really the determinative one; and that a continuing business is but a continuing repetition of these cycles from commodity back to commodity, which does not chiefly consist of money, but in which money is merely a device for facilitating the barter. That past years, as well as future years, are necessarily involved in the matter; and the measurement of the *risks* and the necessity for constant *replacement* present problems of such ever varying uncertainties that, as has been pointed out in the International Harvester case, it is beyond the power of the human mind to measure them, with *any* judicial degree of certainty!

In other words, that the exploded "*mercantile sys-*

---

[1] Nash vs. United States, 229 U. S. 373. 1913.

[2] International Harvester Company of America vs. Kentucky, 234 U. S. 216. 1914.

tem," as it always has, still *remains* based upon pure fallacies, fallacies which, if adhered to, will not only destroy our prosperity, but will of necessity end our Freedom!

That there may, at the very beginning, be a clear comprehension of what it is intended to explain, a single illustration may suffice. There are many indictments founded upon the Lever Act pending in our Federal Courts, in substance, on the basis that a man who has purchased a commodity at one price and sold it at a much greater, is necessarily a criminal. Suppose he bought at five cents and sold at ten, and the indictment calls the latter price "unjust," "unreasonable" and "excessive." Neither the Government nor the seller could know whether this were so *at the time of the sale.* This will be illustrated at large in the following chapters, but a few of the questions involved will be now mentioned. In the first place, the seller has to guess at what the taxes on his profits will be subsequently declared. They may be anywhere from one to one hundred per cent. He has also to guess *what his money will be worth* in the future *revolutions* in trade that will constitute his continuing business. *Professor Fisher,* of Yale, estimates that the dollar has fallen in purchasing power, through inflation of currency and credit, to but *thirty-five per cent.* of its rightful value. To say, therefore, if the seller buy at five and sell at ten, that he must have had criminal intent in making his guess, and that this can be established beyond a reasonable doubt, is perfectly absurd. If we but keep in mind that all the while he was really only *exchanging commodities for commodities,* the absurdity becomes perfectly apparent. For the moment, let us leave money out of the question. Could any man justly be indicted, should the result of the transaction be that he had borne all the expenses and risks, and yet, had ended

with but one pound of goods to replace his original pound? Much less, could he be indicted, had he in the end actually given *two pounds* of goods for but one? And, yet, that is substantially happening, under an inconceivable return of the thoughts underlying the "commercial system" that is now being unconsciously *revived.* The minute money is introduced into the discussion, its real function and complete lack of stability are both entirely lost sight of, resulting in preposterous and constant error. But, strangely this only relates *to our own money.* When it is some other country's money, we all think as clearly as Adam Smith did upon the subject, and wonder at its folly or commiserate its resulting misfortunes. Take the German marks, for example, how successful an indictment would be there if the mercantile system is to be revived! On the low price of marks, a man could be proven to a jury to have made *two thousand two hundred and twenty-two and one-third per cent. profit,* although he had simply gotten *one pound back for another pound.* If it had been the Russian Government, and they had forced him to take their present roubles, he could be convicted of having profiteered to the extent of *five thousand one hundred per cent.,* although all honest men here agree in denouncing them *for really stealing his property.* And when we come to the Austrian kronen, the man who had simply gotten his *pound for pound cycle* completed, would certainly go to jail when it was proven that in the intermediate *illusory* money step he had apparently made a profit of *six thousand six hundred and sixty-six and two-thirds per cent.!* This is taken only as a single illustration, for all other things in relation to commodities are fluctuating in the same way, though in varying degrees. No man ever has or ever will be able to forecast such situations with even ordinary certainty. To put him where he must

do so *beyond reasonable doubt of error* is to create a dilemma where, if he guesses right, he goes to jail, and, if he guesses wrong, he becomes a bankrupt; so that Governmental price fixing, as to all going business ultimately but means that there will be no trade sufficient even to pay for the keep of those men, heretofore carrying on the business enterprises of the United States, in the jails that will have to be provided for their occupancy. The Government constantly interfering with the essential "liberty of pursuit" will have ended the freedom of which *it* is so essential a part.

The Common Law and the Supreme Court, having, however, always understood that economic knowledge is as essential to commercial law as Anatomy is to Surgery, have never failed properly to safeguard our Liberty, through their appreciation of it!

A change in *either,* placing all those actively engaged in production under the dangers of indictment, for conclusions that they can only have guessed at, and convictions because of further guesses by juries must not only paralyze enterprise, but destroy all that fearless independence of citizenship necessary for the preservation of free government. An apology is made for repetition to be found in the following pages, however constant the effort by which it was sought to be avoided.

GEORGE H. EARLE, JR.

Philadelphia, October 1, 1920.

CHAPTER I.

General Considerations.

*"In favour of Liberty. * * * Impius et crudelis "judicandus est, qui libertati non favet. Angliae "jura in omni casu libertati dant favorem."*

—Coke on Littleton, 124 b.

With the introduction understood somewhat as a syllabus of the many considerations involved, which cannot all be stated at once, a general knowledge of the scope of this inquiry is gained. Little difficulty or discussion would have resulted from the consideration of the Lever Act, had the constant admonitions of the Supreme Court been observed to the effect that whether in construing such Acts or the Constitution itself, there must always be considered both the Common Law and the conditions under which the Constitution was adopted, and Acts passed *in pari materia.* As Mr. Justice White says in the Knowlton case:[3] "The then members of the Congress "* * * must have had a keen appreciation of the "influences which had shaped the Constitution and the "restrictions which it embodied, since all questions "which related to the Constitution and its adoption "must have been at that early date, vividly impressed "on their minds. * * * The people were content "to commit to their representatives the enactment of "reasonable and wholesome laws, *being satisfied with "the protection afforded by a representative and free*

[3] Knowlton et al. vs. Moore, 178 U. S. 41 (at page 57). 1900.

"government and by the general principles of the Com-
"mon Law protecting the inalienable rights of life,
*"liberty and property. * * * The necessities which*
"gave birth to the Constitution, the controversies
"which preceded its formation, and the conflicts of
"opinion which were settled by its adoption, may prop-
"erly be taken into view for the purpose of tracing to
"its source any particular provision of the Constitu-
"tion, in order thereby to be enabled to correctly in-
"terpret its meaning." See also: Pollock vs. Farmers Loan and Trust Co.,[4] The Knight case,[5] The Standard Oil case,[6] The Craig case,[7] and Rhode Island case.[8]

It will be remembered that, as will be shown in detail later, an unremitting struggle had been going on, at least from the time of Magna Charta, between the English people, on the one hand, and the Trade Association, known as "Guilds," and, finally, the Crown asserting a prerogative, to determine whether trade should be carried on, and prices fixed *in a free competitive market,* or whether *this* liberty to trade should or could be controlled by monopolistic price fixing and control either by combinations of men *or the Government itself;* and that by the Statute of James I[9] the victory was definitely determined in favor of the people, and that which they had always contended was essential to their freedom.

---

[4] Pollock vs. The Farmers' Loan & Trust Company, 157 U. S. 429 (see page 558). 1895.

[5] United States vs. Knight, 156 U. S. 1. 1895.

[6] Standard Oil Company of New Jersey vs. United States, 221 U. S. 1. 1911.

[7] Craig vs. Missouri, 4 Peters 409. 1830.

[8] Rhode Island vs. Massachusetts, 12 Peters 657. 1838.

[9] The Statute of 21 James I C. 3 (Statute of Monopolies) demolished all existing monopolies, with the exceptions of grants of privileges under Acts of Parliament, patents, printing, etc. It abolished monopilies owned or controlled by the Crown.

It will be further remembered that in the year of our Revolution, in 1776, Adam Smith's great work [10] had been published, the nature of trade carefully explained; the "mercantile system" as completely routed; and the true nature of business and its relation to the wealth of nations clearly and finally expounded in its most essential features. It will also be remembered that for twelve years thereafter the Constitution was either being discussed, drawn or adopted, until the final signature of General Washington was attached on the seventeenth day of December, 1787, and that the first ten amendments were declared in force upon the fifteenth day of December, 1791, a period during which Adam Smith's work had been thoroughly digested and as thoroughly understood and accepted.

It is not thought necessary at the present moment to state the results that then had been reached at Common Law, and finally buttressed by the Constitution, with minute exactness or in great detail; but generally it was held that all restraints of trade—that is to say, *"trade"* itself, not merely *"traders,"*—where their restraint did not restrain trade itself,—were against the public welfare, and injurious; and that the greatest of all trade evils was when they reached the point of monopoly. On the other hand, the right *freely* to trade in commodities at the *untrammeled* discretion as to terms, and prices, of all who wished to compete, was thought, *and correctly thought,* not only to be a part of our Liberty, but perhaps, its most essential safeguard.

If this be not understood, error is sure to result, as it has already resulted, in a misunderstanding of the decisions of the Supreme Court of the United States;

[10] Adam Smith's "Wealth of Nations."

for, as Lord Coke has long since said: "*The law is "not known to him who knoweth not the reason "thereof.*"

Monopolies, therefore, having come to be considered the most "odious," the most "pernicious," the most injurious of trade evils, almost the equivalent of treason,—because they enabled individuals, in effect, to tax the community, not through its representatives, but through their own arbitrary decrees, and thus strike at the very root of our Liberty,—were and have always been considered necessarily, a subject of State control. *If this be not conceded,* the public utility cases are sure to be misunderstood.

It was found that in a certain class of cases, such as water, gas, electric, and transportation companies, the public convenience was best served by the organization of enterprises *monopolistic* in their nature; and so great has been the evil of monopoly that the State has never given up its continuing control of such enterprises; even preferring all the uncertainty, danger, and difficulty of arbitrary and non-competitive price fixing to the greater evil of permitting a substantial power of taxation to rest in the hands of individuals not representative of the people who pay the taxes. So that all such grants have been received subject to the State's reserved power in this respect.

Accordingly, *in such cases,* price fixing has always remained a legislative function. At this point, however, the Constitution steps in and provides that the State, even in exercising this power, cannot overrule the constitutional provision providing against confiscation. Nevertheless, and this is of the utmost importance, this being a *legislative function,* it has been determined that the rate fixed by the Legislature in such

cases, *being within its power,* is presumptively correct to such a degree that nothing short of *clear proof* can abrogate it. It will thus be seen that this reduces the matter in these cases to a simple question of burden of proof *and adequacy of evidence.* There is nothing else involved.

On the other hand, when we come to consider the production and sale of *common commodities,* the production and sale of which are open to anyone, without State grant or assistance, and there being no danger of this monopolistic taxation, it has been proven through the centuries that *they* will always, and inevitably, seek the "natural" or "normal" price that will tend to fair exchange with other commodities, and that absolutely no other method was ever tried with any success. That *prima facie,* the market price, that is to say, the price that is ever resulting from freedom in competition, is the right price; the one that will restrict *over production* and at the same time stimulate the *needed production* in times of scarcity. So the matter is reversed and the *"free"* price becomes irrefutably the *"fair price,"* and, therefore, in such case the burden of proof having shifted and the duty of showing the contrary by sufficiently clear legal evidence, resting upon those who question it, the attempt to supplant it by criminal statute, to supplant it not only in face of the continuing presumption of innocence, but by evidence that establishes every essential fact, becomes impossible. It is beyond all possibility to prove that a matter is not what it is, and always has been.

It is manifest that in cases of a monopolistic nature, a decision in favor of the Government price is not necessarily a decision that the price fixed is reasonable, much less reasonable beyond all reasonable doubt (the Supreme Court is ever pointing out how uncertain and

difficult the matter), but is merely a decision that those complaining have not sustained the burden of proof placed upon them by public policy; whilst a decision against the rate by reason of the omission of any necessary element of calculation is conclusive proof of unreasonableness and consequently of illegality.

A finding, therefore, that any charge is illegal because of the omission of such an essential feature, is a conclusive finding that those traders who have included it in their calculations have done so reasonably, and that if there is no ascertainable basis of reaching a definite test, no basis that excludes as a necessary element speculation, guessing or surmise, they have not, at least beyond all reasonable doubt, violated their duty; and that, where such elements of uncertainty are fixed conditions of business enterprises, there does not, and cannot exist the data upon which indictment or conviction is possible in a free government, or after a fair trial within the meaning of the Constitution. Because free men cannot lose their *liberty* or property for errors of judgment resulting from the lack of powers or of the guiding of the necessary and adequate experience of the ordinarily reasonable average business man.

With this understood, nothing more clearly demonstrates the accuracy of the position taken by the Supreme Court in the International Harvester case,[11]

---

[11] Note: In International Harvester Co., etc., vs. Kentucky, 234 U. S. 216, 1914, the company had been prosecuted, convicted and fined for having entered into agreement, as it was alleged, with other companies for the purpose of controlling the price of harvesters, enhancing such price above the "real value" of harvesters, and for having sold them at a price in excess of their "real value." The Kentucky statutes, under which the prosecutions were brought, made punishable by fine or imprisonment agreements, or combinations entered into for the purpose of limiting, fixing or changing the price of articles or in any way to diminish their output; and also to prevent "all trusts from combining to depreciate below its

the Collins case,[12] and the Pennsylvania Railroad case,[13] than the decisions already delivered in cases of monopolistic nature. Let us, therefore, now examine some of the principles therein enunciated, always remembering the rules of presumption and burden of proof therein involved. It will be found that, even if standing alone, they demonstrate that a criminal statute such as the Lever Act cannot possibly be constitutionally enforced, because of the natural impossibility of proving that which is absolutely requisite.

Mr. Justice McKenna, in the case of United States vs. United States Steel Corporation, which was decided by the Supreme Court on March 1, 1920, says :[14] "* * * "in a case of this importance, we should have something "surer for judgment than *speculation,* something more "than a deduction equivocal of itself, even though the

---

'real value' any article, or to enhance the cost of any article above its 'real value.'" The Harvester Company contended that the law offered no standard of conduct that it was possible to know in advance and to obey. The Court held that the statutes were invalid upon the principle that to compel a guess what the fair market value of commodities manufactured or sold would be under other than existing conditions is beyond constitutional limits.

[12] Note: In Collins vs. Kentucky, 234 U. S. 634, 1914, under a statute of Kentucky a pool or combine of the crops of tobacco and other farm products was permitted to the growers for the purpose of obtaining a better or higher price than by separate sale. It was made unlawful and punishable by a fine for any person who had made a "pooling agreement" to make separate sale of his crop. Collins, after entering into such an agreement, sold his tobacco crop by independent sale, and his indictment followed. He contended that the statute was in violation of the Fourteenth Amendment of the Constitution in that it deprived him of liberty and property. The Court decided that the statute was unconstitutional, and fundamentally defective by reason of its uncertainty. It made it necessary for Collins to determine his conduct not according to known standards, but by speculating upon imaginary conditions in determining the value of his tobacco crop.

[13] United States vs. Pennsylvania Railroad Co., 242 U. S. 208. 1916.

[14] United States vs. U. S. Steel Corporation, 251 U. S. 417 (see pages 448 and 449). March 1, 1920.

"facts it rests on or asserts were not contradicted. *If "the phenomena of production* and prices were as easily "resolved as the witness implies, much *discussion and "much literature have been wasted, and some of the "problems that are now distracting the world would "have been given composing solution.* Of course, com- "petition affects prices, but it is only one among other "influences, and does not more than they *register itself "in definite and legible effect."*

In the earlier Knoxville case,[15] the Court said: "Before coming to the question of profit at all, the "Company is entitled to earn a sufficient sum annually "to provide not only for current repairs but for mak- "ing good the depreciation and replacing the parts of "the property when they come to the end of their "life. *The Company is not bound to see its property "gradually waste, without making provision out of "earnings for its replacement.* * * * It is not only "the right of the Company to make such provision, *but "it is its duty,* etc."

Of course, this duty is simplicity itself in the kind of case there treated, because the stock of the Company was chiefly invested in real property, but when one comes, in a rapidly fluctuating market, to calculate what may be necessary for replacement of commodities that must be entirely parted with, and then replaced,—not merely used, the calculation, as will be shown, is absolutely impossible. Again, the Court says in the same case:[15a] "The operations of the preceding fiscal year, or of any "other past fiscal year, were valueless if the year was "*abnormal.* * * * If, as in this case, sufficient time "has passed, so that certainty *instead of prophecy* can "be obtained, the certainty would be preferable to the

[15] City of Knoxville vs. The Knoxville Water Company 212 U. S. 1 (see page 13). 1909.

[15a] Id., page 15.

"prophecy. In this case there could be no absolute "certainty, because the ordinance had [16] never been put "in operation. * * * Suppose, by way of illustra- "tion, that before bringing suit the Company had put "the ordinance into effect and had observed it for a "number of years, and the result showed that a suffi- "cient net income had been realized, is it possible that "a suit then could be brought and the evidence confined "to a period prior to the ordinance, and *by a process "of speculation* the conclusion reached that the ordi- "nance would be confiscatory? * * * Where the "case rests, as it does here, *not upon observation of the "actual operation* under the ordinance, *but upon spec- "ulation as to its effect, * * * we will not guess* "whether the substantial return certain to be earned "would lack something of the return which would save "the effect of the ordinance from confiscation. It is "enough that the whole case leaves us in grave doubt." And the Court thus concludes its opinion with the following enlightening statement:[16a] "Regulation of "public service corporations, *which perform their "duties under conditions of necessary monopoly,* will "occur with greater and greater frequency as time goes "on. *It is a delicate and dangerous function.* * * * "The Courts ought not to bear the whole burden of "saving property from confiscation, though they will "not be found wanting where the proof is *clear.* The "Legislatures and subordinate bodies, to whom the "legislative power has been delegated, ought to do their "part. Our social system rests largely upon the sanc- "tity of private property, and that State or community

[16] The ordinance in question was enacted by the City of Knoxville fixing in detail the maximum rates to be charged by the company in its business of supplying the city and its inhabitants with water for domestic and other uses, etc.

[16a] City of Knoxville vs. The Knoxville Water Co., 212 U. S. 1 (see page 18). 1909.

"which seeks to invade it will soon discover the error "in the disaster which follows. The slight gain to the "consumer, * * * is as nothing compared with his "share in the ruin which would be brought about by "denying to private property its just reward, thus un- "settling values. * * * If hereafter it shall appear, "under the actual operation of the ordinance, that the "returns allowed by it operate as a confiscation of prop- "erty, nothing in this judgment will prevent another "application to the Courts."

After this statement of principles enunciated in a case where the Government started with the presumption in its favor, how could the decision in the Harvester case [17] have been otherwise, under the much more difficult conditions of estimating in the case of commodities, and in relation to a criminal statute, whether a price is in excess of "real value," or not, especially where there were no sales, or possibilities of real tests. And the Government labors under the burden of proof,—the duty to establish its case not by a mere guess, but also beyond all reasonable possibility of doubt. But the merchants under the Lever Act have thrust upon them, as will be seen hereafter, a far more delicate and dangerous function than ever before was imposed under any statutory or other enactment.

In the Wilcox case,[18] Mr. Justice PECKHAM says: "All these matters make questions of value somewhat "uncertain; while added to this is an alleged pro- "spective loss of income from a reduced rate, a matter "also of much uncertainty. * * * And we have a "problem as to the character of a rate *which is difficult*

---

[17] International Harvester Co. vs. Kentucky, 234 U. S. 216. 1914.

[18] Wilcox vs. Consolidated Gas Company, 212 U. S. 19 (see page 42). 1909.

"*to answer without a practical test from actual opera-*
"*tion of the rate.* * * * A Court of Equity ought
"not to interfere by injunction before a fair trial has
"been made of continuing the business under that rate,
"and thus eliminating, as far as is possible, *the doubt*
"*arising from opinions as opposed to facts.* * * *
"Such compensation must depend greatly upon cir-
"cumstances and locality; among other things, *the*
"*amount of risk in the business is a most important*
"*factor.* * * * The less risk, the less right to any
"unusual returns upon the investment. *One who in-*
"*vests his money in a business of a somewhat hazard-*
"*ous character is very properly held to have the right*
"*to a larger return without legislative interference,*
"*than can be obtained from an investment in Govern-*
"*ment Bonds or other perfectly safe security.* * * *
"It, in other words, *becomes matter of speculation or*
"*conjecture to a great extent.* * * * Taxes, even if
"founded upon an erroneous valuation, were properly
"treated by the Company as part of its operating ex-
"penses." Although the proof had again failed to show clearly error in the governmental rate, the bill was again dismissed without prejudice.

In the Northern Pacific case,[19] the Court says: "There are many factors to be considered * * * *the* "*risk assumed.*" And the Court again speaks of "the "difficult question of determining what is a reasonable rate."

Again, in the Louisville case, it is said:[20] "Where "an existing freight rate is attacked, *the burden is on* "*the complainant to establish that it is unreasonable* "*in fact.* * * * While some elements of value are

[19] Northern Pacific Railway Company vs. North Dakota, 236 U. S. 584. 1915.

[20] Louisville & Nashville Railroad Company vs. United States, 238 U. S. 1 (see page 11). 1915.

"fixed, *the market price of property and work is af-*
"*fected by so many and such varying factors as to*
"*make it impossible to lay down a rule by which to de-*
"*termine what any article or service is worth.*"

In the Lincoln Gas Company case,[21] the Supreme Court says: "As early as the month of January, 1909, "this Court, in two notable rate cases, indicated its "view of the importance, *in any but a very clear case,* "*of subjecting prescribed rates to the test of practical* "*experience before attacking them in the Courts.* * * * "*There are too many doubtful items for us to adjudge* "*the ordinance void, in the absence of an actual and* "*timely test.* * * * *It is a matter of common knowl-* "*edge that, owing principally to the world war, the* "*costs of labor and supplies of every kind have greatly* "*advanced since the ordinance was adopted,* and largely "since this cause was last heard in the Court below. "And it is equally well known that annual returns upon "capital and enterprise the world over have materially "increased, so that what would have been a proper "rate of return for capital invested in gas plants and "similar public utilities a few years ago furnishes no "safe criterion for the present or for the future." As before in these cases the Court modified the decree of the Court below to be without prejudice.

Remembering what has already been pointed out as to the burden of proof and necessary evidence, it was impossible that a Court, having such knowledge upon the subject, could have possibly thought otherwise than as it did in the Harvester and Collins cases, or could require citizens, at the peril of financial ruin and imprisonment, to *guess* what they could only guess at; and hold them to a correct guess where all experi-

[21] Lincoln Gas & Electric Light Company vs. City of Lincoln, 250 U. S. 256 (see page 262). 1919

ence, all economic thought, shows that they not only could not do so with any degree of certainty, much less *beyond any reasonable doubt;* and this at probably the most difficult time in the whole history of the world. What man, when inflation and war have driven prices 400 per cent. above normal, can predict beyond reasonable doubt, when and how prices will recede below normal, although all know that this terrible decline and consequent risk are inevitable?

No more complete demonstration of the impossibility of the average human mind solving such uncertainties can be found than in the results of these efforts of the Courts, made necessary because of the monopolistic nature of this class of enterprise. As has been pointed out by the Supreme Court, the ablest specialists have consequently been employed in this work. In considering these problems, first the Legislatures act, taking all the time necessary to reach just conclusions, then there is called into service to do the best, either an able master, selected by the Court, or a commission of trained experts, again taking all the time requisite, weeks, months or years; and, in turn, there is an appeal to a court of justice, and from its consideration it passes through Courts, until finally determined by the ablest and highest judicial body in the world. It, in turn, has had to introduce the new practice of offering opportunity of additional tests; although the cases have been fully heard. Finally, with all this the Supreme Court had to predict the disaster that has come, were it not to receive still further and better assistance. And all these high experts were dealing with the easiest possible cases of price fixing; all of them had all the resources of the Government at their service, and, as has been said, none of them had to act hourly, with no time for de-

liberation or investigation, as is inevitably the case in the sale of commodities. Every one knows now that because of the impossibility of performing the burden of supplying adequate facts, millions of dollars of property, as a fact, have failed to receive the protection of the guarantees of the Constitution, and have suffered confiscation by the Government. Not only this, but the calculations have been so far astray that the Government itself, these industries being essential, has already had to tax the people millions of dollars, and will probably ultimately have to increase the taxpayers' burdens even by billions to relieve the situation. And, further, that nothing has done more, not even the inflation of the currency, than the confusion and failure of *service* which has followed, to increase the cost of living and inflict a general demoralization of production, with an enormous enhancement of cost, resulting from all this *new uncertainty*—as well as from the *general uncertainties* which have always surrounded the subject. Well has the Supreme Court declared it *"A difficult and dangerous task"*! If anybody could know price fixing it would be the Supreme Court. Its decisions have been, in effect, always wise and right, and as correct as human genius permits, because it has always protested against and thoroughly realized the impossibility of performing this task satisfactorily even to itself. That no one else could have done better is easily demonstrated.

As sugar has been chiefly discussed in the cases, arising under the act, it may be herein used as the illustration. It is the most discussed subject, and, indeed, the only commodity as to which President Wilson has himself been willing to assume the risk and undertake the task of price fixing which the Act he signed, no doubt with the utmost patriotism and good intent, has

placed upon the merchant; imposing as the act does fine and imprisonment as a penalty for not performing it to the satisfaction of the Government. What is now said is not stated with any purpose of *criticism,* indeed, is only strengthened by the admission of the President's great ability, of his long and careful deliberation, before acting; and his unprecedented advantages for reaching correct results. He was offered an amount of sugar that would have taken care of the national needs and have made sugar relatively the cheapest food commodity in the country. The price, however, was perhaps double the prior minimum price. With all his advantages for decision, he declined the offer, and the market promptly advanced to over four hundred per cent. of normal price, costing the country, and adding to the price of living, hundreds of millions of dollars! He has been severely criticized, but, I think, very unjustly criticized, and for the reason given by the Supreme Court in the International Harvester case.[22] *The task was not capable of certain performance by even the powers of his active intellect.* This can be demonstrated! In the first place, the great body of Cuban planters, with their long experience and expert knowledge, all thought the transaction was desirable. They were just as much in error as he. In the second place, it is demonstrated that the great body of Americans engaged and expert in the business were equally wrong, because, had they purchased their supplies in an adequate amount at the *then* market price, the subsequent rise would have been impossible, because of a lack of market. Again, you have a demonstration of the impossibility of which the Supreme Court so well treats in the Harvester case. If the President erred, it was in a mere matter of belief, not founded upon,

[22] International Harvester Company vs. Kentucky, 234 U. S. 216. 1914.

but in contradiction to, the principles of the Common Law and of established political economy. Such attempts at price fixing, from their very nature, could not permanently succeed, and only tended to confusion and a resulting increase of prices through the accompanying increase of *risk* and *uncertainty.*

That the Harvester case is right, the Lever Act wrong, if it is to be so interpreted, seems of the easiest test.

Men may, of course, be indicted if (as Justice Holmes says in the Nash Case) *"in many instances,"* they do not use *the ordinary reasoning* of the average man; to punish them for not having higher powers would be pure despotism.

Now, the Lever Act, if anything, is an act to punish, not for mistake, but for inordinate greed; not for taking precautions against risk, where uncertainty abounds; but for doing what the supposed "reasonable man" must beyond any reasonable doubt know was not necessary to meet all contingencies.

But, if the average reasonable man had power to do this, all ordinary men must be enormously rich, for guessing being no longer necessary, men need not limit their wealth except by their wishes. So that the Act would require criminal punishment for not having extraordinary powers! It would be *by legislation,* an attempt to do the impossible, and by edict to turn mere surmise into mathematical deduction, and necessary speculation into deliberate crime! But, as statisticians generally agree that but one man who attempts business out of each ten, succeeds, that would be to declare a thing *only guessed at, proven beyond reasonable doubt,* in the face of the fact that the chances of the guess being right *is "only one in ten."*

And when that does occur to any large degree, it

is largely the result of unusual and superior ability in guessing. Under modern methods, most of these great businesses are conducted by corporations, whose stocks can readily be obtained on the Exchange. It is manifest, therefore, that if this power of forecast really existed, those happily possessing it would shortly divide the wealth of the world. It is equally manifest that if the agents of Government, or members of juries could, even in a majority of cases, forecast such matter, no amount of salary that could be paid them would be adequate to keep them in Government employ. The world would be at their feet. The truth is that if laws against profiteering could be just, there would be no occasion for profiteering at all; for if there were no excessive risks or inordinate losses to be guarded against, there would be no occasion for equal profits to balance them, as all men could grow enormously rich, by the continued flow of never-failing gain. A broker, some years since, stated that not one per cent. of his customers, who continued to trade, ultimately made money, and that the most successful of them were those who acted on the principle that the general estimates must prove wrong, and so bought in contradiction of the general belief. That all this has been realized by the generations who have built up the Common Law upon the subject, through an unvarying experience, came from the fact that during that time the nature and character of business was gradually being learned and understood.

Later, that the writer may not be thought to stand alone in his conclusions, undisputed authority will be quoted to sustain the views expressed. The present effort is only to state their results succinctly. The primary distinction of business from other means of gaining livelihood is "*risk taking.*" The business man

is the *"risk taker";* and, as Adam Smith correctly points out, the universal rule is that hope triumphs over fear, and that this vital element of risk is nearly always underestimated. It will be remembered that the Supreme Court has already decided that requiring compensation for the consequences of this risk is not profit at all. Again, it must be borne in mind that the function of money in trade, misunderstood until the time of Adam Smith, *merely consists in aiding in the circulation of commodities,* and is not the substance of the matter at all. That its real utility is not in changing commodities for money, but in facilitating *the change of commodities for commodities.* "The fact is, "that all trade in the last analysis is simply what it "is in its primitive form of barter, the exchange of "commodities for commodities. The carrying on of "trade by the use of money does not change its essen- "tial character, but merely permits the various ex- "changes, of which trade is made up, to be divided into "parts or steps, and thus more easily effected. *When "commodities are exchanged for money, but half a full "exchange is completed. When a man sells a thing for "money, it is to use the money in buying some other "thing—and it is only as money has this power that "anyone wants or will take it."* Beyond that, a most lurking danger is in the ignorant assumption that money has a stable value, whilst other things fluctuate. And this misconception constantly ruins a large part of the community; whilst an equally large part is lured to dangerous extravagance by the illusion that its wealth has been enormously increased when nothing has changed except a depreciation of the mere counters that thus merely revolve trade. It has been said Professor Fisher pointed out that money, before the war, had nearly three hundred per cent. of its pres-

ent purchasing power; this decline resulting from the enormous inflation that took place during the war. Beyond that, the dealer in commodities has the problem of replacing these commodities and making the necessary calculations to do so *many times a year.* He has to be always *"guessing,"* and, in a vast majority of cases, *he guesses wrong,* and so ultimately fails. Perhaps, indeed, the most vital error is in confusing "price" with "value." A great number of indictments under the Lever Act are pending from this very mistake. The proof that a man has paid one price and has charged a hundred per cent. more and upward for the same goods, standing alone, really means absolutely nothing. The real question is whether he has properly guessed what the replacement price will be; and that, of course, he can only do, in most cases, by mere surmise. His wealth consists in his commodities, and he is going straight to ruin, if deceived by the depreciation of the counters of exchange, he fail not to replace that real wealth with a sum fully adequate to secure an equivalent amount. A Pacific Coast Judge on this account has just, very properly, directed a verdict where the illusory profit was apparently one hundred and fifty per cent. of the cost price. That the price of goods is not the wealth, but that the goods themselves are, and that the price is but a method of exchanging wealth for real wealth—that is, other goods —is an indisputable axiom of political economy. But let us again test this by the example of sugar, which we have heretofore used, taking that example for the additional fact that a great part of the facts actually are of record.

Suppose a refiner has a stock worth ten million dollars with the price five cents a pound. Suppose that price from his best guess, is going to advance, or does ad-

vance, to ten cents a pound, and he sells it on that basis, not his mere purchase price, plus a living profit, which is consumed. He is, therefore, demonstrated, if price be a just test instead of replacement value, to have made upward of one hundred per cent. profit. But he only can replace his stock, for all that has taken place is that, in relation to that stock, money has depreciated. Now suppose, as has happened, he calculated correctly again that sugar would go to twenty cents, and again charged its replacement value plus a living profit. He now, apparently, has turned his ten million dollars' worth of counters into forty million dollars. The average jury, and even some judges, might think that atrocious. The informed business man would probably lie awake at nights trying to devise means of escaping bankruptcy. And why? As the Common Law, and the Supreme Court of the United States, have demonstrated by the Harvester and Collins cases, he *understands the real situation.* In the first place, at the end of the year, his *illusory* profit would, at the lowest, have to be divided with the Government. His taxation would, at the least, be fifteen million dollars, and then at any moment, and certainly some time, under demonstrated rules of political economy, the tremendous increase of production, inevitable from the stimulus of such prices, must drive the price below the original price, and probably keep it there for years, until increased consumption catches up with the oversupply thus resulting. His forty million dollars of stock must, therefore, at some time, shrink *below* the original ten millions, demonstrating a countervailing loss of fifteen million of dollars. His account thus would stand at the end with no profits except those upon which he had lived, and with deductions of fifteen million dollars for taxes, (and nothing to meet them with except

the sum below ten million dollars which his maintained stock would then bring), so that he would be bankrupt at least to the extent of five million dollars, and, incidentally, have additional fines to pay and perhaps be put in jail for criminal profiteering. And all this would be the result of a reversion to the exploded theories of the mercantile system! Most of these prosecutions when the matter is understood, are simply attempts to punish men for not exchanging a greater amount of sugar, for a less amount, or in other words for not agreeing to an actual confiscation of their stock. Indeed, in the Myatt case,[23] the indictment was for selling sugar at fourteen cents per pound and making four cents; and as sugar subsequently reached twenty-eight cents, remembering that the real transaction consisted of exchanging commodities for commodities, in that case there was a charge of crime, probably for no other cause than *not giving two pounds of sugar for one pound.*

The purpose of the Lever Act, of course, was to insure, as far as possible, an indefinite and increased continuation of these revolutions from goods to goods, called "business," so as to require not only a guess for a present turn, but for a security against risk in the many subsequently to take place.

But everyone *knows* that none can foresee what our taxes are to be. Propositions now before Congress, if these errors are to prevail, would sweep away one hundred per cent. and upward of profit. Everyone knows that prices are enormously high. No one can, of course, know when the inevitable drop will take place. A merchant knows only that *it must take place,* as it already has in the case of silk and leather commodities involv-

[23] United States vs. Myatt, 264 Fed. Rep. 442. 1920.

ing not only many individuals, but a great nation, in serious financial difficulty. All of us now know, as John Stuart Mill says, in "Principles of Political Economy,"[24] "When a commodity * * * can be "made in indefinite quantity * * * if the value "* * * is such that it repays the cost of production "with a higher rate of profit, *capital rushes to share "in this extra gain,* and by increasing the supply of the "article, reduces its value. *This is not a mere sup-"position or surmise,* but *a fact* familiar *to those con-"versant with commercial operations.* * * * *There "is sure to be,* in a short time, so large a production or "importation of the commodity, as not only destroys "the extra profit, *but generally goes beyond the mark, "and sinks the value as much too low as it, before had "been raised too high;* until the over-supply is cor-"rected by a total or partial suspension of further pro-"duction." It is the one case *where reaction actually exceeds action.*

Indeed, where has there ever been a more complete demonstration of these truths than is now passing before our eyes? Under the law of supply and demand, raw sugars, notwithstanding repeated indictments for alleged profiteering, moved in continuing advance. There then came the inevitable competition from all parts of the world, and an enormous drop of nearly the equivalent of thirty-eight dollars a barrel for refined sugar has taken place—a decline, doubtless, largely in excess of any advance for which anyone has been indicted, and, yet, a decline that was as inevitable, *at some time,* as further large declines that are sure to take place. And this decline took place, at just the busiest season when all would have expected the highest prices!

[24] John Stuart Mill, in "Principles of Political Economy," Book III, Chapter III, Section I.

It will thus be seen from the cases referred to in this inquiry that the Supreme Court of the United States has done an immense service to the world in placing the freedom-preserving principles of the Common Law upon the right ground, and bringing them within constitutional protection; whilst, at the same time, acting in full accord with the demonstrated truths of economic, as well as civil law; but no other court, as yet, seems to have examined the whole subject.

Mr. Mill thus states the matter:[25] "Loans are "not the only kind of contract of which Governments "have thought themselves qualified to regulate the con- "ditions better than the persons interested. There is "scarcely any commodity which they have not, at some "place or time, endeavored to make either dearer or "cheaper. * * * In some cases, as for example the "famous 'maximum' of the Revolutionary Government "of 1793, the compulsory regulation was an attempt "by the ruling powers *to counteract the necessary con- "sequences of their own acts; to scatter an indefinite "abundance of the circulating medium with one hand, "and keep down prices with the other; a thing mani- "festly impossible under any regime except one of un- "mitigated terror.* * * * All that Governments can "do in these emergencies, is to counsel a general mod- "eration in consumption, and to interdict such kinds of "it as are not of primary importance. * * * *A limi- "tation of competition, however partial, may have mis- "chievous effects quite disproportioned to the apparent "cause.*"

---

[25] John Stuart Mill, in "Principles of Political Economy." Book V, Chapter X, Section 3.

We have so far been treating this Act on the basis that its generally *assumed* meaning is its real meaning. In the next chapter the inquiry will be whether there is any ground whatever for such an assumption.

CHAPTER II.

The Real Meaning of the Lever Act.

If the Act[26] means what many have assumed, it has, unquestionably, not only wrought the greatest revolution that has yet taken place in our law; but has literally destroyed a public policy, to the development

---

[26] The Lever Act (Act of Congress approved August 10, 1917, Section 4, as amended by Section 2 of the Act approved October 22, 1919), reads thus amended as follows:

"That it is hereby made unlawful for any person wilfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or wilfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distibution; to hoard, as defined in Section 6 of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, *or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries;* to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in necessaries; (b) to restrict the supply of necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of necessaries in order to enhance the price thereof; or (e) *to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this section.* Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both: *Provided,* That this section shall *not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist,* with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: *Provided further,* That nothing in this Act shall be construed *to forbid or make unlawful collective bargaining by any co-operative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased* or cultivated by them."

of which all our legislation has been passed during the last thirty years, and nullified the results of thirty years of intensive consideration by the Supreme Court of the United States.

And, what is more, all this has been accomplished by but *three words* [27] in a general statute. It is simply astonishing, therefore, that, up to this time, no adequate inquiry has been found upon this subject; and that its discussion has been *solely by law taken for granted,* instead of law declared through judicial processes; as this is not only an unsafe method; but, as was to be expected, has resulted in most serious confusion and harmful results, there seems to be propriety in further inquiry.

Upon the point of the real meaning of the Act the strangest enigma of the whole subject must not escape our consideration. Bearing in mind that throughout the whole history of the Common Law, it has been considered that it was part of the common liberty for men to buy and sell their property in a free market, always restrained, but *only* restrained by free competition. Remembering, consequently, that all interference with such trading, whether by guilds, combinations, or even Government, were held illegal as invasions of that Liberty that our Constitution was adopted to safeguard. And not forgetting that all experience has always shown that no other system has ever either continued, or failed to be injurious, and finally, that these fundamental truths have been so wrought into our jurisprudence that for generations it has been settled that where prices are thus fixed they are not only "just and reasonable prices," but their best and conclusive evidence; and that Judges have for an unmeasured time always so instructed juries. How can it be explained,

[27] That is—"unjust," "unreasonable" and "excessive."

when the Act used exactly the same terms the Common Law had so continually defined, that so many have simply taken it for granted that it meant exactly the opposite; and thus destroyed the freedom of men to trade in open competition. That for the first time in all history, men were to be punished for following the guidance of the Courts, no other regulation for their conduct being even substituted.

How could it be possible for a learned Judge, in a suit for damages brought for the non-delivery of goods under a contract, to tell a jury that a just, proper and reasonable price as a measure of damages was the price fixed in an open competitive market (called by our judges "the market price"); and in a criminal indictment for exactly the same transaction instruct it that the same thing was ample evidence upon which it, *beyond a reasonable doubt,* could convict for a "crime" committed within the Lever Act.

Certainly, heretofore, an unjust and unreasonable price has always been a price *arbitrarily fixed other than by free trading,* whether by Government or other freedom-destroying method. Is not the question as to how such a violent change is supposed to have taken place by a mere use of the words always used with this established meaning,—as Lord Dundreary would say, "one of those things no fellow can find out"? It certainly is not allowable by any judicial methods heretofore prevailing.

The language of Mr. Chief Justice WHITE in the Wilder case,[28] exactly covers the ordinarily assumed meaning: "In the first place," he says, "the conten-
"tion cannot be sustained consistently with reason. *It*
"*overthrows the general law.* * * * In the second

[28] Wilder Mfg. Co. vs. Corn Products Refining Co., 236 U. S. 165 (see page 173). 1915.

"place, *the proposition is repugnant to the Anti-trust "Act.*"

The greater part of the material necessary to establish these contentions is to be found in the Act itself and in Chief Justice White's exhaustive opinion in the Standard Oil Company case,[29] treating of the Sherman Act, which, is *in pari materia* [30] to the statute now under consideration: "We shall," he says, "make our "investigation * * * in the light of the common law "and the law of this country at the time of its adop- "tion. * * * It is certain that those terms,[29a] at least "in their rudimentary meaning, took their origin in "the common law, and were also familiar in the law of "this country prior to and at the time of the adoption "of the Act in question. We shall endeavor, then, first "to seek their meaning * * * by making a very "brief reference to the elementary and indisputable "conceptions of *both the English and American law on "the subject prior to the passage of the Anti-trust Act.*" After pointing out that "by the Common Law "monopolies were unlawful because of their restric- "tion upon individual freedom of contract and their "injury to the public," and that one of the injuries that resulted *"is an undue enhancement of price,"* and that the freedom of contract of the individual was preserved not only in his own interest, but *"principally in the interest of the commonwealth";* and that "from the development of more accurate economic con- "ceptions and the changes in conditions of society it

[29] Standard Oil Co. vs. United States, 221 U. S. 1. 1911.

[29a] The terms "restraint of trade," "attempt to monopolize" and "monopolize."

[30] The Sherman Act, the Clayton Act, the "Commodities Clause of the Hepburn Act," and the Lever Act, together with other like enactments of Congress, are "in pari materia" in the sense that they relate to the general subject of trade regulation and must be construed with reference to each other.

"came to be recognized that the acts prohibited by the "engrossing, forestalling, etc., statutes did not have the "harmful tendency, * * * but, on the contrary tended "to fructify and develop trade," and had, therefore, been repealed. "This would seem to manifest, either "consciously or intuitively, *a profound conception as "to the inevitable operation of economic forces and "the equipoise or balance in favor of the protection "of the rights of individuals which resulted.* * * * "*After all, this was but an instinctive recognition of "the truisms that the course of trade could not be made "free by obstructing it, and that an individual's right "to trade would not be protected by destroying such "right.* From the review just made, it clearly results "that * * * outside of the want of right to restrain "the free course of trade by contracts or acts which "implied a wrongful purpose, freedom to contract and "to abstain from contracting and to exercise every rea- "sonable right incident thereto became the rule in the "English law. The scope and effect of this freedom "to trade and contract is clearly shown by the decision "in Mogul Steamship Co. vs. McGregor (1892), A. C. "25. * * * here, as had been the case in England, "practical common sense caused attention to be con- "centrated * * * to the result itself and to the rem- "edying of the evils which it produced. * * * It is also "true that * * * the principles concerning contracts "in restraint of trade * * * came generally to be "recognized in accordance with the English rule, it "came moreover to pass that contracts or acts which it "was considered had a monopolistic tendency, espe- "cially those which were thought to unduly diminish "*competition and hence to enhance prices* * * * came "also * * * to be spoken of and treated as they "had been in England. * * * very briefly survey-

"ing the whole field, it may be with accuracy said that "*the dread of enhancement of prices and of other* "*wrongs* which it *was thought would flow from the un-* "*due limitation on competitive conditions* * * *, in "view of the common law and the law in this country "as to restraint of trade * * * and the illuminating "effect which that history must have under the rule to "which we have referred, we think it results: That the "context manifests that the statute was drawn in the "light of the existing practical conception of the law, "* * * It indicates a consciousness *that the freedom* "*of the individual right to contract when not unduly* "*or improperly exercised was the most efficient means* "*for the prevention of monopoly, since the operation* "*of the centrifugal and centripetal forces resulting* "*from the right to freely contract was the means by* "*which monopoly would be inevitably prevented.* * * * "*In other words, that freedom to contract was the es-* "*sence of freedom from undue restraint on the right to* "*contract.*"

There could not be a clearer statement of the oft-demonstrated principle *that the greatest protection possible against excessive prices was to be found in safeguarding the freedom of competition, which, of course, could not exist if its chief method of underbidding was wrested from free traders.* In other words, it certainly has been the law heretofore, both statutory and common, that in accord with sound economic theories, *unreasonable and excessive prices were those that were created by monopolistic restraints on trade, and which were best checked by preserving the right to engage in free competition.* Since the time of King John, that has been steadily contended for, and without intermission. *There has at no time been any excessive price, however high the price may be, when that price*

was fixed by freemen in a free market. Excessive price has thus, again and again, been defined for centuries. Excessive price is, and has always been, a price arrived at by some illegal method, and not by free competition, its only real cure.

Again, in the Tobacco case,[31] it is pointed out that the remedial purpose which the Act contemplated was to prevent the destruction of liberty of contract and all substantial right to trade and not to cause "*the Act "to be at war with itself by annihilating the funda-"mental right of freedom to trade,* which, on the very "face of the Act, it was enacted to preserve."

Again there could be no more forcible statement that the law (unless repealed by the Lever Act because of its three words, "unjust," "excessive" and "unreasonable"), still is, according to centuries of Common Law and all our prior statutory law, that competition is not only "the life of trade," but also "the mother of cheapness." That freedom, if preserved by law against monopolistic restraint, is the best and, indeed, *the only safeguard*! It is difficult to understand how anyone familiar with the subject and the decisions, can reasonably think that three perfectly familiar words, that have had a legal meaning for centuries to the contrary, are sufficient to set at nought all the work of great lawyers and economic thinkers. The cases are numerous that when words in a certain connection, in statute or in law, are given a constant meaning, it takes demonstration to the contrary not to so understand them in a subsequent statute. In addition, this change of interpretation if constitutional, would cause the greatest confusion in fixing the measure of damages in all civil suits, in all accountings of

[31] United States vs. American Tobacco Company, 221 U. S. 106 (at page 180). 1911.

Trustees, and in too numerous phases of the relations of individuals. The inconveniences would be enormous! But the Supreme Court has said, in the Knowlton case,[32] "That where a particular construction of "a statute will occasion great inconvenience or produce "inequality and injustice, that view is to be avoided if "another and more reasonable interpretation is pres-"ent."

If the decisions of the Supreme Court are to be regarded, no such result can follow, for "in cases ad-"mitting of doubt, the intention of the lawmaker is to "be sought in the entire context of the section—statute, *"or series of statutes in pari materia,"* as decided in the Atkins case.[33] "It is elementary when the constitu-"tionality of a statute is assailed, if the statute be rea-"sonably susceptible of two interpretations, by one of "which it would be unconstitutional and by the other "valid, it is our plain duty to adopt that construction "which will save the statute from constitutional in-"firmity. * * * The rule plainly must mean that "where a statute is susceptible of two constructions, by "one of which grave and doubtful constitutional ques-"tions arise and by the other of which such questions "are avoided, *our duty is to adopt the latter,"* as held in the Delaware case.[34] Again, in the Washington case:[35] "Repeals by implication are not favored and "usually occur only in cases *of such irreconcilable con-"flict* between an earlier and later statute that effect "cannot reasonably be given to both." "Whenever a "departure from common law rules and definitions is

[32] Knowlton et al. vs. Moore, 178 U. S. 41. 1900.

[33] Atkins vs. The Fiber Disintegrating Company, 18 Wall. 272. 1874.

[34] United States vs. Delaware & Hudson Company, 213 U. S. 366, 1909.

[35] Washington vs. Miller, 235 U. S. 422. 1914.

"claimed, the purpose to make the departure *should be "clearly shown,"* as said by Justice Brewer in his concurring opinion in the Northern Securities case.[36]

The Chief Justice has shown, in the Standard Oil case, as plainly as it can be made, that undue prices are prices that result from monopoly, because the normal or proper price, the non-excessive price, is the price fixed in free competition. For, as the political economists have declared, this always tends to an equalization of profits and the exchange of commodities upon a fair basis. When, however, you come to civil cases, the uninterrupted definition of fair prices has always been the same. Where damages have to be fixed by a jury, a reasonable price has always been *the market price fixed in free competition.* It would be impossible to cite all the cases upon this point, but reference is made to Hopkins vs. Lee,[37] where the Court says: *"Otherwise, the vendor, if the article have risen in "value, would always have it in his power to discharge "himself from the contract and put the enhanced value "in his own pocket."* To the same effect is the principle sustained in New York vs. Estill,[38] Roberts vs. Benjamin,[39] and Western Union Telegraph Co. vs. Hall.[40] The Supreme Court, as now constituted, declares the same law in the Gulf case.[41] Trustees are surcharged if in the performance of their duties they do not obtain a known market price in a sale of prop-

---

[36] Northern Securities Co. vs. United States, 193 U. S. 197 (at page 361). 1904.

[37] Hopkins vs. Lee, 6 Wheat, 109 (at page 118). 1821.

[38] New York, Lake Erie & Western Railroad Co. vs. Estill, 147 U. S. 591 (at page 616). 1893.

[39] Roberts vs. Benjamin, 124 U. S. 64. 1888.

[40] Western Union Telegraph Co. vs. Hall, 124 U. S. 444 (at page 456). 1888.

[41] Gulf, Colorado & Santa Fe Railway Company vs. Texas Packing Company, 244 U. S. 31 (at page 37). 1917.

erty belonging to the trust estate. The reasonable price under the common counts in pleading at Common Law was always the market price.

If it is not to be so, how are the Judges ever to instruct a jury? Shall they now say that there no longer is any measure of damages except that which may, some time in the future, be determined by the Supreme Court of the United States after a criminal prosecution has been brought? The state of trade will become appalling and impossible.

But we may dismiss all this, for, if all the sections of the Act be examined, it shows that it was adopted in full recognition and agreement with the law as laid down in the Standard Oil case. In the first place, the words in Section 4 as amended are used in connection with acts so unlawful at Common Law and under the Sherman Act as to make the profit resulting "unreasonable," "unjust" and "excessive," as constantly determined. In the second place, one of the sections of the Act actually protects, *by double penalty, "the market price"* from unfair manipulation which would have no effect if it contemplated other than the meaning universally given to the term. Thirdly, it properly denominates the funds given to the President to be used in business as *"revolving funds,"* showing a keen and exact perception of the necessary nature of business transactions, as well as the difficulty of following them to an ultimate conclusion, *before* that conclusion has even been reached. In the fourth place, even where the President does fix the price, it is still to be fixed, if unsatisfactory, on the usual basis. His decree is to be in nowise final. And, finally, and most conclusively, in the case of certain of the essential commodities, it actually provides for the establishment of a governmental guarantee *for the maintenance of a price,* perhaps, over

two hundred per cent. of the normal price, to stimulate increased production, showing a complete realization of the truth enforced by the Common Law that such is the proper and most effective way of securing "adequate supplies in times of scarcity." To say that such a statute, *in pari materia* with similar statutes, without a word of repeal, demonstrates an implied determination to wreck our whole system of statutory and judicial determination of this matter, goes beyond the bounds of reason. As has already been said, nothing could be more astonishing than that it should have been even discussed as a possibility, much less assumed without any argument. So far as this question is concerned, the statute, properly construed "in the light of well-settled principles," is plainly constitutional.

Two considerations pointed out by Judge Connor in the Myatt case,[42] are of value. The first that "a fair "and reasonable construction of the entire section "*would make the purpose or intent an essential ele-* "*ment in the unlawful character of each of them*"; and second, as he thus states it:[43] "It is significant that "neither of the words 'price' or 'profit' is found in "either of the prohibited acts which may be committed "by a single person."

This leads to a fact constantly overlooked. At Common Law men were not only permitted to obtain bargains, but profit by them. Indeed, with free competition, the more bargains that were obtained, the better for the consumer, as those having obtained them would in their competition be naturally able and tempted to give the public at least a portion of the benefit. If the incentive were to be taken away, it would inevitably tend to higher prices. Now, the Act scrupu-

[42] United States vs. Myatt, 264 Fed. 442. 1920.
[43] Id., page 448.

lously avoids any mention of such profits. And it cannot be written into a criminal statute. The supposed offense is restricted to unjust, unreasonable and excessive prices. That a large profit was made is unimportant, provided that the price charged was not excessive. And excessive prices were already defined by law! The Act in nowise overrules Hopkins vs. Lee;[44] but most of the indictments are under a non-existent supposed Act, and, in substance, merely charge that a man bought at one price and sold at a higher price. Whether this was an excessive price is not made clear, and leaves the matter *in equilibrio,* as is well illustrated by the case where a man was indicted for selling an article at one-half the price at which he might on the actual results have had to replace it, if his business were to continue. When it is remembered that the Act requires merely that he be "reasonable," the proof required must be at least beyond reasonable doubt that he could not reasonably have even made such a surmise as to risk—which, of course in the case of commodities, is substantially an impossible task.

Another consideration that has been strangely overlooked is that under the provisions of the Act there is such a recognition of the principles underlying the working of the law of supply and demand through free competition that the Government itself actually and by arbitrary edict fixed the price of wheat, for instance, at largely upward of two hundred per cent. in excess of that "dollar wheat" that the farmers, not so long since, were actually praying for. To argue, therefore, that an Act, thus actually applying the Common Law standard of free competition to obtain its natural results, was an Act intended to repudiate its own method, and make it criminal should the same incentive come about

[44] Hopkins vs. Lee, 6 Wheat. 118. 1821.

through the free course of trade approaches absurdity. To indict citizens, should their combined efforts in a free market bring about the same results as the Government's edicts, could not have been the intention of the Act. And the Government could not have intended that prices so resulting were to be punished as excessive and in violation of its provisions.

But there are other questions of constitutionality that should be discussed, and they will be reserved for the next chapter.

CHAPTER III.

The Constitutionality of the Act.

Some of the difficulties, indeed most of them, under this heading, disappear, if the Lever Act be interpreted as it should be; but as there has been some contention (and even judicial opinion in our United States Courts though, contradicted by many reaching the opposite conclusion) that the Act intended all the revolutionary and unconstitutional things hereinbefore discussed, it may be proper to discuss its constitutionality, *as so incorrectly interpreted;* and that will be taken up shortly. But, in the first place, even if the purpose of the Act looked, on the contrary, to the high end, as it is believed it did, of further safeguarding the liberty of those engaged in trade, it contains one blemish which properly should, and must nullify it, unless the Supreme Court is to depart from essentially right decisions, so often reaffirmed by it without dissent.

The Act makes it unlawful in substance [45] for any person wilfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste, of, or to hoard necessaries, to monopolize, or to engage in discriminatory, deceptive or wasteful practices or devices affecting necessaries, to conspire or combine in transporting, producing, harvesting, supplying or dealing in necessaries, to restrict the supply, or distribution thereof, to prevent, limit or lessen the manufacture or

[45] See Note 26, page 37, supra, for exact phraseology of Section 4 of the Act, as amended.

production in order to enhance the price, or to exact unjust, unreasonable or excessive prices for necessaries. Intentionally to do any of these acts in a period of extreme public peril, would certainly be unpatriotic and wrongful. There can be no earthly reason, no reasonable foundation, for legislating that *any citizen* of the United States should be permitted to wage war against the vital interests of his country. And as food entirely arises and is produced from the soil, and can never serve its purpose if there destroyed, to no class should these prohibitions more urgently apply than those engaged in such primary production; and yet the Act actually provides: "That this section "shall not apply to any farmer, gardener, horticultur- "ist, vineyardist, planter, ranchman, dairyman, stock- "man, or other agriculturist, with respect to the farm "products produced or raised upon land owned, leased, "or cultivated by him"; and then further provides that they alone can co-operate, so far as their production is concerned, in what the drafters of the Act are pleased to call "collective bargaining," and what the law in any other case would call "criminal conspiracy."

These provisions, it is conceived, are far from complimentary to the patriotism of a very large class, of which the writer is one, who, there is no reason to believe, wish to commit crimes against the welfare of their country in a time of its greatest peril.

But the Supreme Court, having already condemned and declared unconstitutional a far less vicious exemption found in a statute of the sovereign state of Illinois in an opinion covering nearly ten pages of most effective reasoning, it would be impertinent to attempt improvement, and the Connolly case,[46] is referred to

[46] The facts in Connolly vs. Union Sewer Pipe Co., 184 U. S. 540, 1902, were as follows: The Union Company brought suit

as the most complete discussion of this question; a similar conclusion being reached in the late case of McFarland vs. American Sugar Refining Company,[47] in the last paragraph of Mr. Justice Holmes' opinion.

If the reasoning of Mr. Justice Harlan delivering the opinion of the Court in the Connolly case is followed, the classification made between the citizens of the United States by this exemption clause of the Act most certainly infringes the constitutional rights of citizens to be protected against discriminatory and class legislation. The vigorous denunciation by Justice Harlan of such exemptions in legislation may be gathered from the following language of his opinion:[46a] "We conclude this part of the discussion by saying

against Connolly upon two promissory notes given for sewer pipe sold and delivered to him. Connolly refused to pay the notes at maturity on the sole ground that the Union Company was: (1) a trust or combination contrary to the common law, (2) a combination contrary to the Sherman Anti-Trust Act, (3) and a combination contrary to the Illinois Anti-Trust Act. Under the Illinois Act it was provided that *any* contract made by a company violating the act was "absolutely void and not enforcible." This Act also contained the following vital section: *"The provisions of this act shall not apply to agricultural products or livestock while in the hands of the producer or raiser."* The Court decided as to the first two propositions that a buyer could not refuse to comply with his contract of purchase on the ground that the seller was an illegal combination; and that the combination could be illegal, and yet the sales of property owned by it be valid. The Court declared the Illinois Statute was unconstitutional as it was discriminatory and repugnant to the Fourteenth Amendment, which provides "that no State shall * * * deny to any person within its jurisdiction the equal protection of the laws." The Court pointed out that under the Statute all persons engaged in trade or commerce, except agriculturalists and raisers of livestock, who combined their capital, skill or acts might be punished as criminals, while the latter might combine to destroy competition and control prices for their own benefit without a violation of law. The exemption of the Statute was arbitrary classification. Judgment for the company upon the notes was affirmed.

[46a] Connolly vs. Pipe Co., 184 U. S. 540 (see page 564). 1902.

[47] McFarland vs. American Sugar Refining Co., 241 U. S. 79 (see page 86). 1916.

"that to declare that *some of the class* engaged in do-
"mestic trade or commerce shall be deemed *criminals*
"if they violate the regulations prescribed by the State
"for the purpose of protecting the public against illegal
"combinations formed to destroy competition and to
"control prices, *and that others of the same class* shall
"not be bound to regard those regulations, but may
"combine their capital, skill or acts to destroy compe-
"tition and control prices *for their special benefit,* is
"so manifestly a denial of the equal protection of the
"laws that further or extended argument to establish
"that position would seem to be unnecessary." However, it may be noted in this connection, as exemplifying the diversity of views upon these vital questions that Judge Manton, delivering the opinion of the Circuit Court of Appeals for the Second Circuit, in Weed & Co. vs. Lockwood,[48] rules "that Congress could make "this classification and it be held not in contravention "of the Constitution, International Harvester Co. vs. "Missouri, 234 U. S. 199," and Judge Hough, a member of the same Court, and concurring in the opinion, says: "It would also be constitutionally obnoxious, "because it is a gross piece of class legislation—incap-
"able of distinction from that condemned in Connolly
"vs. Union, etc., Co., 184 U. S. 540."

The objections are so many, if the assumed interpretation of the act is to stand, that the only difficulty is to know where to begin, or how many of them to discuss.

Let us start by paraphrasing the Act as thus incorrectly interpreted. Its provisions would then mean (1) that no owner of merchandise had longer any right to

[48] Weed & Co. vs. Lockwood, Circuit Court of Appeals, Second Circuit (not yet reported). Opinion of District Court in 264 Fed. Rep. 453. 1920.

place his own value on his own property; (2) that in *guessing* at what he should charge, the century-old method of seeking an open market, controlled only by free and untrammeled competition, was denied him; (3) that the Government, substituting no standard of guidance for the one taken away, first makes him guess, and second makes him guess with a mind so trammeled by fear that the guess of a jury will not accord with his guess, and will likely subject him to years of imprisonment and enormous fines. All of such dangers and uncertainties must so paralyze his mind, if he really believed the Courts would permit such things, as to incapacitate him from any proper use of his faculties—freedom of mind being as essential a part of liberty, as that of body; (4) that it would constitute an usurpation of the judicial power of the Government by the legislative power, making it dangerous in the extreme for citizens to appeal to the Courts for protection and for interpretation of their property rights; (5) that as the Act expressly gives these constitutional rights to citizens dealing with the Government and denies them to those dealing with each other, there would be a violation of the privileges and immunities guaranteed by the fifth amendment; (6) and that as it destroyed all standard of prices, it would constitute that criminal, and reached by guesses alone, upon which an enormous preponderance of men have always and are still guessing wrong; (7) that, as a large part of business payments are really for service, it would enslave men by compelling them to work for compensation not fixed by themselves; (8) that it creates an undefined power of confiscation; (9) that it, by legislation would terminate the freedom of trade safeguarded by the Constitution; and (10) that it really will establish Communism in the United States. Many

more reasons could be given, and be discussed in detail, but in a matter so plain, a general statement is deemed sufficient.

The subject is simplified, however, by understanding certain fundamental conceptions of our law. In the first place, it has been settled for centuries, and in accordance with sound reasoning, that property really consists *in the free enjoyment of its fruits.* Lord Chief Justice Coke gives many illustrations of this primary principle. For example, this idea is so paramount that, as he points out:[49] "If a man seised of lands in fee "by his deed granteth to another *the profit* of those "lands, to have and to hold to him and his heires, and "maketh livery *secundum forman chartae,* the whole "land itselfe doth passe; *for what is the land but the "profits thereof.*"

This, of course, being founded upon reason, remains our law today. Mr. Justice Clarke, delivering the opinion in Branson vs. Bush,[50] says: "But the "value of property results from the use to which it is "put, *and varies with the profitableness of that use,* "present and prospective, actual and anticipated. "*There is no pecuniary value outside of that which re-"sults from such use. The amount and profitable char-"acter of such use determines the value.*"

It is, of course, therefore, just as unconstitutional to take any part of the profits as it is to take any part of the commodity without just compensation. Upon this subject the Supreme Court, in treating of legislation providing that one man's property should be vested in another private person, says:[51] It "would,

[49] Littleton, 4 b.

[50] Branson vs. Bush, 251 U. S. 182 (see page 187). 1919.

[51] Chicago, Burlington, etc., R. R. Co. vs. Chicago, 166 U. S. 226 (see page 235). 1897.

"if effectual, deprive the former of his property with-
"out due process of law. * * * Such an enactment
"would not receive judicial sanction in any country
"having a written Constitution distributing the powers
"of Government among three co-ordinate departments,
"and committing to the judiciary, expressly or by im-
"plication, authority to enforce the provisions of such
"Constitution. It would be treated *not as an act of*
"*legislative power, but as a sentence, an act of spolia-*
"*tion.* Due protection of the rights of property has
"been regarded as a vital principle of Republican in-
"stitutions. 'Next in degree to the right of personal
" 'liberty * * * is the right of enjoying private
" 'property without undue interference or molestation.'
"The requirement that the property shall not be taken
"for public use without just compensation is but 'an
" 'affirmance of a great doctrine established by the
" 'Common Law for the protection of private property.
" 'It is founded in natural equity, and is laid down by
" 'jurists as a principle of universal law. *Indeed, in*
" '*a free Government, all other rights would become*
" '*worthless if the Government possessed an uncon-*
" '*trolled power over the private fortune of every citi-*
" '*zen.*' "

Another very valuable opinion in this connection is that of Mr. Justice Miller, in the case of Loan Assn. vs. Topeka,[52] and, quite recently in Smith vs. Texas,[53] it is said: "Life, liberty, property, and the equal
"protection of the law, grouped together in the Consti-
"tution, are so related that the deprivation of any one
"of these separate and independent rights may lessen
"or extinguish the value of the other three. In so far

[52] Loan Assn. vs. Topeka, 20 Wall. 655 (see pages 663-665). 1875.

[53] Smith vs. Texas, 233 U. S. 630 (see page 636). 1914.

"as a man is deprived of the right to labor, his liberty "is restricted, his capacity to earn wages and acquire "property is lessened, and he is denied the protection "which the law affords those who are permitted to "work. Liberty means more than freedom from servi- "tude, and the Constitutional guarantee is an assur- "ance that the citizen shall be protected in the right "to use *his powers of mind* and body in any lawful call- "ing.

The very late case of Adams vs. Tanner,[54] incorporates in the law of the United States Shakespeare's statement that: "You take my house when you do take "the prop that doth sustain my house; *you take my life* "*when you do take the means whereby I live.*"

As the Supreme Court has so often insisted that, no matter how covered, it will seek out and be guided by realities, and that it is a primary duty to safeguard our present system of Republican Government and freedom as against despotism, Communism and all other systems, it seems only necessary to refer again to the decisions already cited to show that, if the Act is to be wrongly interpreted, it must be unconstitutional as establishing the very spirit and principle of Communism in substituting Governmental price fixing for the liberty-preserving method of freedom and competition.

It has been established that those things which tend to monopoly are illegal, because an invasion of freedom; it has been established that the fruits of property are property itself, that, in taking them in whole or part, you take property; and the Fifth Amendment establishes that, even for public uses, property cannot be taken except by giving a just equivalent found by

---

[54] Adams vs. Tanner, 244 U. S. 590 (see page 593). 1917.

the Judicial Department of our government. All these are necessary to safeguard Liberty.

If the Act be wrongly interpreted, plainly it would violate the Constitution by taking property for private use through some governmental agency, as no standard is attempted to be given, by an *ex post facto determination,* put into effect *after* the vendor had made his guesses as best he could. Moreover, as has always been the case in such attempts against Liberty, it would terrorize those *producers* or sellers of necessaries (who are not exempted by the Act), by threats of punishment, cruel and despotic beyond reason. Treating of this subject, Professor Laughlin in his work on "Money and Prices" well says:[55] "It is a means of supple-"menting individual incapacity and want of success "by assessment upon efficient and successful members "of society. *This is Socialism pure and simple.* It is "following the tendency to look to the State for aid "when individual effort begins to be distasteful; it re-"moves the incentive to industry from those weaklings "who need to know that success is not the fruit of idle-"ness and shiftlessness. To let such as these feel that "their inefficiency may be condoned by the collective "efforts of society is to penalize thrift and put a "premium on failure. To legislate in favor of the in-"efficient at the expense of the efficient is to put dem-"agoguery on the throne and discourage the very quali-"ties on which the stability and moral growth of so-"ciety always have, and always must, depend. *Think "of a civil polity which in the interest of one set of "persons should undertake to regulate the prices of "goods in the country's markets—whenever intemper-"ate overtrading has been followed by a commercial*

[55] Laughlin's "Money and Prices," Chap. VII (see pages 187 to 192).

"*crisis, or an abundant crop, and a small foreign de-*
"*mand has lowered the price of wheat or cotton! If*
"*we are to enter upon that path, it is well to know*
"*whither it leads. One such step in Socialism leads*
"*to another, and the outcome is the subversion of exist-*
"*ing society.* * * * Shall we accept dishonor, or
"shall we disappear down the unknown path of So-
"cialism? One or the other must we choose, *if the pub-*
"*lic is pleased to occupy itself in the future with the*
"*price question.* * * * *And so soon as the forces*
"*operating on price are understood to be complex and*
"*of a nature not to be interfered with by legislation,*
"*we shall be freed from a dangerous agitation.* * * *
"*sooner or later, the United States must face the in-*
"*evitable political issue between the socialistic and non-*
"*socialistic conceptions of Government.* * * * It
"was not merely the free coinage of silver, or the at-
"tacks upon the Supreme Court, which created an
"epoch-making year in American politics, but it was
"the first open appearance of a Socialistic theory of
"Government, *which happened to emerge in the guise*
"*of the price question.* * * * Whatever the spe-
"cial issue, we shall have to cope with Socialistic forces
"in one form or another."

On the same subject, Henry George, whom no one will accuse of ultra-conservatism, says, in his "Progress and Poverty":[56] "These are the substitution of "governmental direction for the play of individual "action, and *the attempt to secure by restriction what* "*can better be secured by freedom.* As to the truths "that are involved in socialistic ideas, I shall have "something to say hereafter; but it is evident that "*whatever savors of regulation and restriction is in it-*"*self bad.*"

[56] Henry George's "Progress and Poverty" (page 317).

It is believed that there is no difference of opinion on this subject between Adam Smith, John Stuart Mill, or any of the other great masters of political thought.

It must never be forgotten, also, that the reach of this question is universal. If the State can wrench the control of the prices of commodities from the hands of all the people exercising their inalienable right of pursuit through the means of free competition pursued at their free discretions, it is, of course, inevitably fixing the compensation for their services and labors. As Adam Smith has so clearly shown, in the case of sales of many commodities, recompense for labor is not only an important factor, but *the predominating factor.*

It must not be forgotten, also, that the Supreme Court of the United States has, again and again, determined that the freedom of pursuit is constitutionally protected, and is only subject to such limitation or regulation by legislation as can be shown to be warranted by public welfare; and that there is no disagreement among those really well informed that such attempts at regulation are, on the contrary, pernicious to the last degree; that this has been not the result of mere theorizing, but of the actual tests and experiences of centuries. That such attempts have resulted in unvarying failures, and *have been* abandoned, sometimes after the greatest suffering, and always after imperilling Liberty herself.

It is strange that, in view of these vital questions, practically all of the attention of the lower Courts, in respect to this Act, has been directed to but a single question relating to the "uncertainty" of its provisions. This probably is the reason why there has been such a conflict of views between them; but, however that may be, the discussion of this phase of the Act throws so much light upon the question that it seems to merit the most careful examination.

CHAPTER IV.

The Uncertainty of the Act.

The problem that is now to be dealt with is whether, there being a market price determined through the "higgling of the market," there is the requisite data available to business men upon which, beyond any reasonable doubt, they can, as business men, determine just what *deviation* from such market price they should make to satisfy *any* judge and *any* jury that they had not acted criminally. In other words, to ascertain what any chance twelve men might think a proper variance from the *"Market Price"*—which is, of course, the recorded judgment of *all* the rest of the world.

To avoid confusion, it must be borne in mind that the "market price" is an ever-varying one, being determined only by a free market, where each one is entitled, as a freeman, to offer what he pleases or to sell on terms satisfactory to himself. In other words, that it is the price constantly and ever being fixed, and thus meeting every variation and contingency necessary to be faced by men exercising the freedom of a democracy, instead of the bondage of communistic government. Grave error is made in assuming that it is ever *a fixed price.* It is every varying to meet all influences, and is simply *the last price* made in a free market. It is in reality, *the price of freedom!*

Another preliminary consideration must not be lost sight of, and it is that, as every one wants to buy at the lowest prices, and sell at the highest, there is always a perplexing political agitation going on to se-

cure state aid either to boost or reduce prices by governmental action. This always results in agitations most dangerous to our institutions, and in favor of majorities, seeking their ends through unjust and arbitrary power, as by inflating the currency, or penalizing those who use their inalienable right "to pursue their "own happiness," obeying the law,—*that is, of course, the Constitutional Law,*—in an exercise of their own free discretion. The Courts have been fond of saying that they will not either make contracts for men, or assume the guardianship of competent adults. The legislative branch of government, unfortunately oft tries to thrust this task upon them.

Further, it is practically impossible to obtain absolutely impartial juries in such cases. Who has ever heard of one charged with profiteering being acquitted where the shield of the Constitution was withdrawn by the Courts from his protection? Of course, a jury might be found, of such high timber, as to rise above all personal interest and prejudice, but it would be exceptional, for as sellers are alone indicted and as in most instances juries must be composed of buyers (whose attitude of mind is picturesquely described according to the Scriptures as, "It is naught, it is naught, "saith the buyer, but when he is gone his way, then he "boasteth": Proverbs, Chapter XX, Verse 14), called to pass upon the question whether they are to pay more or less for what they want and who are influenced by a strong public sentiment supporting them in endeavoring to make things cheap for everybody. Such a disposition but really insures higher prices, as has been proven again and again, however little it may be realized for the time being by the masses of men.

But "*Nemo sibi esse judex vel suis jus dicere*

"*debet.*" [57] A fundamental principle of justice not departed from by the Roman Law, and long since declared in our own jurisprudence. "*Nemo debet esse Judex in* "*propria sua Causa,*" [58] That the ablest Judges have always realized these difficulties in such cases is abundantly shown, but nowhere better than in the opinion of Mr. Justice Holmes in the Northern Securities case:[59] "Great cases," he says, "like hard cases make "bad law. For great cases are called great, not by "reason of their real importance in shaping the law "of the future, *but because of some accident of immedi-* "*ate overwhelming interest which appeals to the feel-* "*ings and distorts the judgment.* These immediate in- "terests exercise a kind of hydraulic pressure which "makes what previously was clear seem doubtful, and "before which even well-settled principles of law will "bend. What we have to do in this case is to find the "meaning of some not very difficult words. We must "try, I have tried, to do it with the same freedom of "natural and spontaneous interpretation that one "would be sure of if the same question arose upon an "indictment or a similar act which excited no public "attention, and was of importance only to a prisoner "before the Court."

Indeed, when the principle of universal justice, stated in these foregoing maxims, is applied to the "erroneous" interpretation of the Lever Act, the most inconceivable results instantly appear. The Government makes no provision whatever to instruct those

[57] The maxims that "no man ought to be his own judge, or to administer justice in cases where his relations are concerned," and "No one should be judge in his own cause" are repeatedly found in the decisions of all our courts.

[58] Id.

[59] Northern Securities Co. vs. United States, 193 U. S. 197 (see page 400). 1904.

engaged in business as to what they are or are not to charge for their commodities. Indeed it, in fact, constitutes the dealers the governmental agents to determine the proper price for commodities both for themselves, and for the public, with its adverse interest, despite the fact that such dealers have not only a continuing interest, but, very often, a trust duty to others, to make the business that they are transacting as successful as possible. The Act intensifies the violation of these maxims by providing that, in turn, such dealers are to be judged in a criminal proceeding by a jury drawn from those having the conflicting interest! In a word, the Act insists upon a satisfactory result from biased minds, to be determined by other minds equally biased to the contrary, and provides, upon the question of prices, no method of test or appeal to a proper judicial tribunal from that which constitutes a legislative determination, except where actual cases for punishment for possible error in price fixing are before the Court.

The contention, therefore, must be that men can be convicted of crime by juries in larger part of adverse interest, solely for being compelled to reach conclusions, under the duress of otherwise abandoning their means of livelihood, in cases where, both under divine and civil law, they have heretofore universally been precluded from decision at all because from natural human infirmity they are incapable of satisfactory performance.

For the law positively to declare that "*no man can "serve two masters,*" and then not only to force him to do so, but put him in prison because he has not done so satisfactorily, and to pass judgment upon him by the verdict of a body of men also, subject to the disabilities of personal interest,—cannot be a portion of

our splendid system of justice, buttressed by the Constitution and always safeguarded by Judges whose highest duty is its preservation.

But men cannot be punished for their ordinary human limitations. That the Harvester case fully determines. But, beyond this, nothing is better settled than that they cannot be punished where confiscatory interference with property is concerned, except when they have a clearly expressed method of judicial determination plainly provided for their protection. This has been so often expressed that but a short reference to the authorities is adequate. It is a right that cannot be lost by uncertainty or obscurity. Men cannot lose it by a statute that makes them guess at a possibility of its exercise, or where the opportunity consists only as a defense to any application or proceeding for their punishment. This is well covered in the very recent cases of Ohio, etc.,. Water Co. vs. Ben Avon Borough,[60] and Oklahoma vs. Love.[61] In the latter case the defendant was, by a State Commission, acting under a statute, prohibited from establishing rates higher than those prevailing in 1913, for laundry work in Oklahoma City. Proceedings were taken for the violation of the orders of the State Commission. It was provided that for disobedience of such orders there was to be a fine imposed, as for a contempt, of not exceeding five hundred dollars a day. Mr. Justice BRANDEIS, speaking for the whole court, says:[62] "So it appears that the only ju- "dicial review of an order fixing rates possible under

[60] Ohio, etc., Water Co., vs. Ben Avon Borough. Decided by the Supreme Court June 1, 1920. Not yet reported.

[61] The Oklahoma Operating Co. vs. Love. Decided by the Supreme Court, March 22, 1920. Not yet reported.

[62] In Oklahoma Operating Co. vs. Love. Id.

"the laws of the State was that arising in proceed-
"ings to *punish* for contempt. * * * By boldly vio-
"lating an order a party against whom it was directed
"may provoke a complaint; and if the complaint re-
"sults in a citation to show cause why he should not
"be punished for contempt, he may justify before the
"Commission by showing that the order violated was
"invalid, unjust or unreasonable. If he fails to satisfy
"the Commission that it erred in this respect, a judicial
"review is open to him by way of appeal on the whole
"record to the Supreme Court. *But the penalties,*
"*which may possibly be imposed, if he pursues this*
"*course without success, are such as might well deter*
"*even the boldest and most confident. The penalty for*
"*refusal to obey an order may be five hundred dollars.*
"* * * Obviously a judicial review beset by such
"deterrents does not satisfy the constitutional require-
"ments, even if otherwise adequate, and therefore the
"provisions of the Acts relating to the enforcement of
"the rates by penalties are unconstitutional, without
"regard to the question of the insufficiency of those
"rates."

Of course, under the Lever Act, a man with a large business might, for errors of judgment resulting from being forced to decide matters that the law has always insisted he cannot be expected to decide properly, suffer endless imprisonment and fines impossible of payment.

In the Ohio case, Mr. Justice McREYNOLDS again says:[63] "We are unable to say that Section 31 [63a] offered

[63] Ohio, etc., Water Co., vs. Ben Avon Borough, United States Supreme Court, June, 1920. Not yet reported.

[63a] Referring to a section of the Public Service Company Law of Pennsylvania which provides that no injunction shall issue to modify or suspend an order of the Commission, except upon compliance with a certain procedure for judicial review of the Order.

"an opportunity to test the order *so clear and definite*
"that plaintiff in error was obliged to proceed there-
"under *or suffer loss of rights guaranteed by the Fed-*
"*eral Constitution.* * * * Without doubt the duties
"of the Courts upon appeals under the Act are judicial
"in character—not legislative. * * * This is not dis-
"puted; but their jurisdiction * * * stopped short
"of what *must be plainly intrusted to some Court, in*
"*order that there may be due process of law.*"

In commodity cases, where prices, of necessity, vary from minute to minute, the decision of one day must be totally inadequate for the next day's prices; and, as there is nothing in the Act by which anyone can obtain relief until after he has acted, at his peril, it is impossible to see how one can have proper constitutional protection under its provisions. Indeed, upon general principles of jurisprudence, has it not always been the law that men, forced to reach conclusions, must be kept free from even the possibility of civil, much less criminal liability, for error in the conclusions that they may reach?

And, if this be so, is it not inconceivable that the Legislature could have intended, or that it would constitute due process of law, even did it so intend, to enact that men were to be criminally punished, under circumstances and for acts of which, the law has always declared, they could not properly judge or expect to attain correct results; and in a class of cases, where the matters involved were of the most speculative and difficult character? Indeed, even of a much more difficult (if not of an impossible) nature than those utility cases of which the Court treated. "In determining

---

The Court held that the section in question did not make adequate provision for testing judicially an order of the Commission alleged to be confiscatory.

"what is due process of law, regard must be had to "substance not to form. * * * 'Can a State make "anything due process of law which, by its own legis- "lation, it chooses to declare such? To affirm this is "to hold that the prohibition to the States is of no "avail, or has no application where the invasion of "private rights is effected under the forms of State "legislation.' " [64]

It cannot be believed that the Courts will ever permit that those, upon whose success and prosperity the revenues and welfare of the nation must depend, should be subjected to treatment that no court of justice would for a moment, permit to be inflicted upon itself under like circumstances,—the vital principle, of course, governing all such cases is that the State cannot force the duty of judgment upon those whose minds it shackles with the fears of danger and with threats of harm. It is no answer in such cases to say that the matter so constantly varies that the State cannot give a fixed rule, for if this be the case, as it is, that simply proves that the attempt is unlawful and oppressive. *"Lex non cogit ad impossibilia."* [65]

This subject well illustrates the point that many business men may rightly feel they are being unjustly treated under the threatening provisions of the Act, and yet have difficulty in formulating exactly of what the injustice consists. The crux of the matter lies largely in that very principle upon which the writer has sought to lay the greatest emphasis, and it is that the law should not require of a man the performance of a duty which by reason of the uncertainties of its conditions, the infallibility of human understanding, and

---

[64] Chicago R. R. Co., etc., vs. Chicago, 166 U. S. 226 (see page 235). 1897.

[65] Coke on Litt., 231 b.

the ever present elements of bias and self-interest, it is not possible for him to discharge with absolute precision, and then to punish him for errors which unwittingly he might make. It would be as extreme to maintain that a jury, a judge, or any extra-judicial body should be held to the strict accountability of absolute accuracy in all of their conclusions. It is not proper for the Act to make the dealer the judge as to when prices are reasonable, fair and not excessive, and then to punish him for error in the judgments at which he arrives. For instance, the Interstate Commerce Commission, necessarily upon the most unsatisfactory and speculative data, has had to pass its judgment in rate cases on so difficult a basis that it has resulted in errors of millions of dollars, so it has been asserted. What could be said of a law that would contemplate that the conclusions of the Commission should be above and beyond all error, or otherwise its members held to a ruinous responsibility?

As was also said in the Sparf case:[66] "I do con-"sider that this power and corresponding duty of the "Court, authoritatively to declare the law, is one of "the highest safeguards of the citizen. *The sole end "of courts of justice is to enforce the laws uniformly "and impartially, without respect of persons or times "or the opinions of men.* To enforce popular laws is "easy. *But when an unpopular cause is a just cause; "when a law, unpopular in some locality, is to be en-"forced, there then comes the strain upon the admin-"istration of justice; and few unprejudiced men would "hesitate as to where that strain would be most firmly "borne."* A statement of fact and of law well applicable to the matters under discussion.

The first cases arising under the Act which have

[66] Sparf vs. United States, 156 U. S. 51 (see page 107). 1895.

been reported,—United States vs. Spokane Co.,[67] United States vs. Cohen,[68] United States vs. Myatt,[69] and Weed & Co. vs. Lockwood,[70]—show that the

[67] In United States vs. Spokane Dry Goods Company, 264 Fed. Rep. 209, 1920, the defendant was indicted for making an unjust and unreasonable charge in dealing in wearing apparel in the City of Spokane. It was contended by the Government that the defendant had sold such apparel at an average profit of 118% based on the cost price. The defendant demurred to the indictment on the ground that the Act was invalid, as being too uncertain a definition of crime. District Judge Rudkin overruled the demurrer, upon the ground principally that the Act was not void for uncertainty and the War power of Congress was sufficient to sustain the constitutionality of the Act.

[68] In United States vs. Cohen Company, 264 Fed. Rep. 218, 1920, which arose in the District Court of Missouri, the defendant was indicted for making an unreasonable charge in dealing in sugar. A demurrer was interposed to the indictment and sustained by the Court in an opinion by District Judge Faris, upon the ground that the Lever Act, though within the War power of Congress, did not define the offenses which it covered, with sufficient certainty that the accused would be informed of the nature and cause of the accusation, and was in consequence, void under Amendment Six of the Constitution.

[69] The case of United States vs. Myatt, 264 Fed. Rep. 442, 1920, arose in the District Court of North Carolina and was a prosecution brought against the defendant as a retail grocer for selling sugar at an unreasonable profit. The defendant bought it for ten cents per pound and sold for fourteen cents per pound. On motion to quash the indictment the Court in an opinion by District Judge Conner ruled that the motion should be denied and the defendant plead to the bill and stand trial upon the issue of the reasonableness of the charges made by him.

[70] In Weed & Company vs. Lockwood, 264 Fed. Rep. 453, 1920, indictments against the defendants, who were engaged in the clothing business, were returned in the District Court for the Western District of New York, for selling wearing apparel at unreasonable and unjust prices. The defendants instituted suits in equity against Lockwood, the United States District Attorney, to enjoin him from proceeding in the criminal actions until the constitutionality of the Lever Act could be determined. The bills set up that the Act was unconstitutional upon the ground that it violated the Fifth Amendment in confiscating property rights of individuals, and that it also was void for uncertainty. The District Court in an opinion by Judge Hazel, refused the injunction, holding that the indictments were not invalid as the Lever Act was constitutional. On appeal to the United States Circuit Court of Appeals for the Second Circuit,

Courts have perceived the difficulties of the situation, although they have reached diametrically opposed conclusions. A careful reading of these cases, however, shows that Mr. Justice Holmes' direction as expressed in the Harvester case to give due consideration to the political economy of the circumstances was not given equal attention. This, it is submitted, caused the varying results reached in their opinions.

All Judges again express their indignation at the so-called "profiteers." Judge Faris, in the Cohen case, however, rising above it, whilst Judge Rudkin in United States vs. Spokane Co. feels the evil so great that he must aid in the supposed remedy, thinking there was no other cure than by way of government interference. The latter observes:[71] "I will only add in con-"clusion, that the situation confronting Congress was "a difficult one at best. To fix profits definitely and "arbitrarily, without reference to place or circum-"stance, would prove unjust and oppressive in the ex-"treme, for it is matter of common knowledge that "what would be deemed a just and reasonable profit "in one place or as to one commodity would be unjust "and unreasonable in another place or as to a different "commodity. Congress was, therefore, compelled to "choose between the course pursued and some other "course *equally difficult.*" He then points out facts which simply prove nothing, if the economics of the subject be fully understood, that is.—that there was a difference of over one hundred per cent.

---

the decree of the District Court was affirmed in an opinion (not yet reported) by Judge Manton, concurred in by Judges Ward and Hough. The opinion, on appeal, sustained the Act principally on the ground that it was a war measure and further that it was not void for uncertainty, or arbitrary in its exemptions.

[71] Judge Rudkin in United States vs. Spokane Company, 264 Fed. Rep. 209 (see page 217). 1920.

between the selling price and the cost price. Judge Rudkin then continues: [72] "That such prices or profits "are extortionate no one will deny. Of course, if con- "fined to the three stores in question, or to only a few "stores, the people have a remedy in their own hands "by withholding their patronage, and, if they fail to "make use of that remedy, to the fullest extent, they, "alone, are to blame. On the other hand, if these con- "ditions are general, and to continue indefinitely, the "people are without remedy, except through govern- "mental action." This finding, of course, is error, as the people not only always have a remedy, but in fact the sole, effective and beneficial remedy.

Indeed, it is an astounding fact that whilst there is marked disagreement, a most clearly expressed doubt, a reference to mere "War power" as the most relied upon support of the Act, there is a universal failure in these decisions to regard Mr. Justice Holmes' *admonition* as to the necessity of examining these questions from the viewpoint of political economists as well as of lawyers. There is not a line to be found in these cases under the Act to show the slightest recognition of the definitely established truth, that high prices always have been, and always will be, *the forerunner of low prices;* that freemen in a free market, with its inducements to gain the higher rewards, strive, invent and compete, so that every temporary rise in price insures not merely a return to the old price, *but to a lower* one, and finally to the fair and equitable exchange of all commodities, measured by the labor relatively involved. No Court even notices the different burden of proof in *quasi-monopolistic* enterprises, and where the free exchange of commodities

[72] United States vs. Spokane Co., 264 Fed. Rep. 209 (see page 217). 1920.

is involved; not a single one notices the established truth that continuing trade is but composed of repeated cycles of barter, of repeated exchanges of goods for goods, in which money but aids the revolution, and is in no case the substance of either step; no one considers that money itself is often more widely fluctuating than goods, and that in such universal advance of commodities we have only a demonstration of the enormous fall of money resulting from the methods of financing the war; all of the lower Courts seem to have the greatest difficulty in distinguishing the Nash and Harvester cases, and no one has attempted to show, as not only is the case but as is so clearly shown by the Supreme Court itself, how absolutely right these cases are, and how necessary for the preservation not only of the Constitution and the administration of justice, but even for the protection of Liberty herself! No decision follows the rules adopted by the Supreme Court relative to the construction and implied repeals of statutory and common law. All of them simply assume that it was the purpose of these three words,[72a] to undo not merely all the work of the Supreme Court since its beginning, but even that of the Common Law for nearly a thousand years. Not one seeks to know why sugar is now selling at sixteen to twenty cents a pound in this time of great scarcity, when in times passed, its normal price always exceeded one dollar. None seeks what Liberty has done for us, nor what we must do for Liberty, if she is to continue to heap her blessings upon us, a measure of blessings that she can alone insure.

Though some of them mention proofs that may be offered juries; there is nowhere taken into considera-

[72a] The words in the Act—"unjust," "unreasonable" and "excessive."

tion the controlling factors of *"insurance," "business risk"* and *"replacement";* nor how these are affected by our greatly depreciated money and our enormous and fluctuating burdens of taxation. None has observed that under some of the indictments, what is really being attempted, is to force merchants to exchange, perhaps, *two pounds of their stock for one pound,* under a threat of ruin and jail, for failing to assume the risks of doing so.

In these cases there is next met the "official war" argument. And see its results! In the only decision under the Act in a Circuit Court of Appeals,[73] as able a Circuit Judge[74] as sits frankly says: "If we were "in a state of 'official' peace, this statute would, in my "judgment, be unconstitutional under International "Harvester Co. vs. Kentucky, *234 United States 216; "the condemnation there express* especially page *223,* "*is applicable here word for word.* * * * *But the "statute is begotten by war.*"

But how can even a *real war,* much less a mere "official" war, repeal the Constitution, turn to ashes the decisions of the Supreme Court, itself, as to what is unconstitutional? That is nowhere explained.

Has not the Supreme Court gloriously laid down a never-questioned doctrine:[75] * * * "the principles of "constitutional liberty would be in peril, unless estab- "lished, by *irrepealable law?* * * * The Constitution of "the United States is a law for rulers and people, "*equally in war and in peace,* and covers with the shield "of its protection all classes of men, *at all times, and "under all circumstances.* No doctrine involving more "pernicious consequences, was ever invented by the art

[73] Weed & Co. vs. Lockwood (United States Circuit Court of Appeals, for Second Circuit. Not yet reported.)

[74] Judge Hough of the Second Circuit.

[75] Ex parte Milligan, 4 Wall. 2 (see page 120). 1866.

"of man than that *any* of its provisions can be sus-
"pended during *any* of the great exigencies of govern-
"ment. *Such a doctrine leads directly to anarchy or*
"*despotism.*"

It is also said, in the recent "war-time prohibition" case of Hamilton vs. Kentucky Distilleries Co.:[76] *"The war power of the United States like its other "powers and like the police power of the States is sub-"ject to applicable constitutional limitations."*

But the learned Justice[77] holds that, beyond doubt, two "applicable constitutional limitations" having been determined by the Supreme Court itself, a violation of them is "justified" by a power, which, the Supreme Court has distinctly and repeatedly said, was subject to such limitations.[78] That cannot be!

Now let us examine just what this would mean, if that hereinbefore stated be correct.

By this mysterious power, three words "unjust," "unreasonable" and "excessive" would repeal by mere implication all rules of interpretation, the whole policy of the Common Law, and the work of the Supreme Court for years upon this subject; it would justify admitted invasions of the Constitution; it would nullify the economic truth that the only cures for scarcity are *decreased consumption* and *increased production,* and the only thing that assures both, is *free competition,* in an open market. It has established the doctrine that the way to obtain large home supplies is to prevent the

[76] Hamilton vs. Kentucky Distilleries & Warehouse Co., 251 U. S. 146. December 15, 1919.

[77] Justice Brandeis in Hamilton vs. Distilleries Co., Id.

[78] The Supreme Court decided in the Hamilton case that under the expressed and implied war powers of Congress, the use and disposition of private property could be restricted without making compensation and without due process of law, as guaranteed by the Fifth Amendment to the Constitution, contrary to the long-established decisions of the same Court that the war power was subject to the limitations of the Fifth Amendment.

workings of sound economic law to further enlarging home production, and thus secure independence, and an average of low prices; whilst, at the same time, our foreign competitors, *under the law of freedom,* are gaining the power to still further control our markets. It has established that a power existing only for self-protection, can contrary to the Constitution, be turned into a power for the destruction of our industries. And the most astonishing contention as to this power, is that it can be used to ruin men for not having mental powers, beyond the capacity of mortal men. For, hereafter, they must know in advance, even in periods of *extraordinary* governmental extravagance just what are to be governmental exactions; in times of exaggerated uncertainty they must measure even beyond any reasonable doubt the fluctuations and future inflation of the currency, the future result of future years,—how much and when inflated prices will collapse, to what degree "replacement" must and will take place, the varying efficiency of labor, all changes in costs, in interest, in freight rates, and every other item involved in doing business; how will occur all contingencies such as wars, strikes, disorders, droughts, floods, embargoes and transportation difficulties; they must, in a word, do what men in larger measure, ever have been striving and ever failing to do.

As this can never be done in the case of commodities, beyond a reasonable doubt, this "war power" must, in times of stress, make legal the absurdity of attempting to aid the nation, by punishing its business men for what always must be *mere guessing;* and seek to impair their efficiency and patriotism by keeping them in constant anxiety lest what they have to "guess at" may seem to be wrong to others, also guessing, but having less knowledge. Such guesses, business men

know, are, in a great majority of cases, sure to be wrong even to the point of their ruin!

As the Nash[79] and Harvester[80] cases show, such is not the law. That which can be measured by reasonable men, with ordinary daily experience, and upon proper evidence, can be and must be so measured "in "many instances," as Mr. Justice Holmes terms it in the Nash case; that which all men know can, in vital particulars, at best be the subject only of surmise, speculation, or guess, cannot be made the basis of any juridicial decision; much less could it be the basis of a verdict at the time of decision known beyond *all* or *"any reasonable doubt."* If men can be "guessed" out of Life, Liberty and Property, they will but live under a tyrannical depotism,—certainly not under the constitutional protections of a free country. Should the contrary of the Harvester decision ever be established in our land, it could not be for long, for economic reasons would make it impossible; nevertheless, it would be a first and dangerous step toward the final destruction of the Republic. This is proven by all history.

As will be shown later, political economists agree that where the rise of commodities is general, *it but indicates a depreciation in the value of money,*—I mean its real value,—that is, the amount of other commodities into which it can be converted. Judge Rudkin, in the Spokane case, notwithstanding his indignation at profiteering, observes that it is the people's own fault if they go to high-price stores, where there is not a general rise—that in such cases there is no occasion for relief. Of course, his greatest economic

---

[79] Nash vs. United States, 229 U. S. 373. 1913.

[80] International Harvester Co. vs. Kentucky, 234 U. S. 216. 1914.

mistake is in thinking it possible that there is no relief except by a liberty-destroying governmental interference. Every Political Economist knows that—except under monopolistic conditions—Freedom herself not only brings relief, meting out a proper punishment, if any punishment be deserved, but brings the only relief that, throughout the centuries, has ever proved effective. Chains and penalties but enhance prices to give the necessary inducement to face ignominy and danger.

The Spokane Company case[81] affords another illustration of the impossibility of enforcing such a law except through injustice and short cuts. No adequate investigation of unjust, unreasonable and excessive prices can really be had; that a man bought at one price and sold at another, *proves nothing in reference to prices.* So far as observation goes, it has been the method universally adopted to establish in the cases before the court alleged profiteering.

Judge Rudkin seems as well to have misunderstood Mr. Justice Holmes' very valuable and clear

---

[81] United States vs. Spokane Co., 264 Fed. Rep. 209. 1920.

[82] Nash vs. United States, 229 U. S. 373, 1913, was a proceeding under the criminal sections of the Sherman Act. Nash, the president of the American Naval Stores Company, was indicted, together with other officials of the company, for alleged acts in restraint of trade dealing in turpentine and rosin. It was charged that the defendants bid down the price of the products so that competitors would be forced to sell at ruinous prices only, circulated false statements as to production and stocks on hand, established "closed ports" for purchasing, made tentative offers of large stores of the products to depress the market, fixed the price below the cost of production to drive competitors out of business, issued false warehouse receipts for turpentine and rosin, and were guilty of numeous other acts to accomplish the purpose stated. The defense was that the statute was so vague as to be inoperative on its criminal side, that the acts and things would not have constituted an offense if they had been done, and that such acts were too vaguely charged in the indictment. The Court, against the contentions of Nash, held that there was no constitutional difficulty in the way of enforcing the criminal part of the act, that the acts alleged if done

opinion in the Nash case,[82] as that in the Harvester case[83] —*two cases perfectly in accord,* and both stating principles without which the law could not be administered. On the other hand Judge Faris, reaching, no doubt, a correct conclusion, by not being so misled, had he also considered the economic side of the matter, would not have required so much fortitude in arriving at the conclusion he did.

The sole distinction between the Nash and Harvester cases is the very simple distinction between the *possible* and the *impossible,*—between those things which can best be determined by juries and those which cannot be certainly defined by anybody—matters covering so broad a ground as to require the judgment *of all men acting with a free and untrammeled use of their judgments,*—and which, even with this great aid, constantly leads to grave error. In many things, men must act upon standards of the reasonable conduct of the average man under the same, or nearly like circumstances; and the average jury is, of course, the tribunal best adapted to ascertain such standards. But even in such cases, there must be evidence adequate to justify a jury's passing upon such matters. Nothing is to be left to *mere surmise.* Even in civil cases the jury will not be permitted to make a finding, where *any* essential fact is left to guess work. If it be proven that a man drove a car through a crowded street at one hundred miles an hour, it is perfectly reasonable for a jury to find that a reasonable man would not so act,—that there

---

by intent would convert what on their face might be no more than ordinary acts of competition or the small dishonesties of trade into a conspiracy of the wider scope, and that the counts in the indictment were not bad for uncertainty. But the judgment on the conviction of Nash and others was reversed by the Supreme Court because of errors in the instructions of the trial Court to the jury.

[83] International Harvester Co. vs. Kentucky. See statement of the facts of the case, supra. Note 11, page 18.

was a violation of ordinary care and public duty. But if it were proven only that some person had so done, without proper evidence that it was the defendant, or if any of the essential facts necessary to establish the offense were lacking, no jury would be allowed by the Court to *guess* it out. Justice Holmes undoubtedly had this thought in mind when he said, in the Nash case:[83a] "The law is *full* of instances where a man's fate de- "pends on his estimating rightly that is, as the jury sub- "sequently estimates it, some matter of degree. * * * "An act causing death may be murder, manslaughter, "or misadventure, according to the degree of danger at- "tending it.' But this is, of course, to be reached *"by "common experience in the circumstances known to the "actor."*

To argue that these words of Justice Holmes meant anything except what he said,—that where men *knew only part of the* essential facts that would *in the future* surround the performance of the second half of the cycle called "trade," they could be punished under *ex post facto* laws and upon guesses; and where these unknown or unknowable facts were to be measured by a common experience that, for centuries, has had no existence, except that which was directly the opposite. It is beyond sound reason.

The common experience as to ordinary commodities has been *through competition* in a fair market, for all other methods have not merely been tried but have always failed. It needs no argument beyond the mere statement, therefore, that Justice Holmes, in saying "that the law is full of instances" meant either by "full" that there were no exceptions, or that he expressly confined these cases to those where the circumstances, without limitation, *were known and could be*

[83a] Nash vs. United States, 229 U. S. 373 (see page 377). 1913.

judged by past instances forming a common experience. It certainly did not mean, as has been said, that where a man was indicted for manslaughter for driving recklessly through a crowded street, he could be convicted upon *guesses* by the jury as to whether he was even there. It cannot possibly be argued that because matters are left to juries in cases where from experience they are the best judges,—where all essential facts to be placed before them are known,—that necessarily it follows they are to be permitted for the first time to guess men into jail in cases where the facts are not known or cannot be ascertained. To argue that because, in many instances "common experience" enables men to make reasonable findings, men should be permitted to find where "common experience" has demonstrated their inability to do so, needs no reply.

In the Harvester case the indictment was for the enhancement above real value and at a price in excess of real value; and, to give this some color of reasonableness, the real value was declared to be "its market value under fair competition and under "normal market conditions"; but, as Mr. Justice Holmes ably says:[84] "We have to consider whether "in application this is more *than an illusory form of* "*words,* when, nine years after it was incorporated, a "combination invited by the law is required *to guess* "*at its peril what its product would have sold for,* if "the combination had not existed, *and nothing else* "*violently affecting values had occurred.* * * * "Value is the effect in exchange of the relative social "desires for compared objects expressed in terms of "a common denominator. *It is a fact* and generally is "more or less easy to ascertain. But what it would

[84] International Harvester Co. vs. Kentucky, 234 U. S. 216 (see page 222). 1914.

"be with such increase of a never extinguished compe-
"tition as it might *be guessed* would have existed * * *
"*with exclusion of the actual effect of other abnormal*
"*influences,* * * * *is a problem that no human in-*
"*genuity could solve. The reason is not the general*
"*uncertainties of a jury trial, but that the elements*
"*necessary to determine the imaginary ideal are un-*
"*certain both in nature and degree of effect to the*
"*acutest commercial mind.* The very community, the
"intensity of whose wish relatively to its other com-
"peting desires determines the price that it would give,
"has to be supposed differently organized and subject
"to other influences than those under which it acts."
Turning to the Nash case, the learned Justice continues:[85] "*That deals with the actual, not with an*
"*imaginary condition other than the fact.* * * *
"But if business is to go on, men must unite to do it
"and must sell their wares. *To compel them to guess*
"*on peril of indictment what the community would*
"*have given for them if the continually changing con-*
"*ditions were other than they are, to an uncertain ex-*
"*tent; to divine prophetically what the reaction of only*
"*partially determinate facts would be upon the imag-*
"*inations and desires of purchasers, is to exact gifts*
"*that mankind does not possess.*"

This case has been again and again followed by the Supreme Court, as is seen in the Collins case,[86] in the Malone case,[87] and in United States vs. Pennsylvania Railroad Co.[88] As Mr. Justice Hughes pointed out in the Collins case,[89] a man is not bound to determine his

[85] International Harvester Co. vs. Kentucky, 234 U. S. 216 (see page 222). 1914.
[86] Collins vs. Kentucky, 234 U. S. 634 (see page 638). 1914.
[87] Malone vs. Kentucky, 234 U. S. 639. 1914.
[88] United States vs. Penna. R. R. Co., 242 U. S. 208 (see page 237). 1916.
[89] Collins vs. Kentucky, 234 U. S. 634 (see page 638). 1914.

conduct apart from *the actualities of life, or by reference to unknowable criteria,* or by speculating upon imaginary conditions, *or by conjecture*;—that statement seems so absolutely to dispose of the matter as clearly as well-expressed words can do it. To those who understand that continuing trade consists of a never-ending succession of half steps, that must always be largely worked out through future and unknowable conditions, there should be no difficulty.

If this need further fortification, exactly the same result was reached in the law of England by the Court of Appeals and the House of Lords in the celebrated and highly commended decision of Mogul Steamship Co. vs. McGregor.[90] The exact distinction is made in this case that our own Supreme Court enforced in the Harvester and Nash cases. It will be remembered how strongly this case has been commended by the Supreme Court of the United States in the Standard Oil Case.[91] "After all," as Chief Justice White says, "this was but "an instinctive recognition of the truisms *that the* "*course of trade could not be made free by obstructing* "*it,* and that an individual's right to trade could not "be protected by destroying such right. * * * The "scope and effect of this freedom to trade and contract "is clearly shown by the decision in Mogul Steamship "Co. vs. McGregor."

The ever memorable opinion of Lord Bowen, in the Mogul case, has exactly the reasoning of Mr. Justice Holmes in the Nash and Harvester cases, with the distinction between the two cases contrasted and con-

[90] Mogul Steamship Co. vs. McGregor, 23 Q. B. D. 598. Decided in the Queen's Bench Division in 1889. On appeal to the House of Lords. 1892 A. C. 25.

[91] Standard Oil Co. vs. United States, 221 U. S. 1 (see pages 55 and 56). 1911.

sidered within the one case. Lord Bowen says:[92] "This seems to assume that, apart from fraud, intimi- "dation, molestation, or obstruction * * *, there is "some natural standard of 'fairness' or 'reasonable- "ness' (to be determined by the internal consciousness "of judges and juries) beyond which competition "ought not in law to go. There seems to be no author- "ity, and I think, with submission, that there is no suf- "ficient reason for such a proposition. It would im- "pose a novel fetter upon trade. * * * until the "present argument at the Bar it may be doubted "whether shipowners or merchants were ever deemed "to be bound by law to conform to some imaginary "'normal' standard. * * * To attempt to limit "English competition in this way it would probably "be as hopeless an endeavor as the experiment of King

[92] Mogul Steamship Co. vs. McGregor, Id. (see page 615). The facts of this case are noteworthy. The Mogul Steamship Company were the owners of certain steamships employed in commerce between England, China and Australia. McGregor, Gow & Company, the defendants, were shipowners who organized an association for the purpose of maintaining the rate of freights in the tea trade between China and Europe, and of securing that trade to themselves by allowing a rebate of five per cent. upon all freights paid by shippers who used only the vessels of the defendants. It was alleged that the defendants had conspired to prevent the Mogul Company from obtaining cargoes for its steamers by bribing, coercing and threatening shippers from using them, to the end that the company would be driven out of the carrying trade from China to England and thereafter freight rates could be maintained at a point which free competition would inevitably lower. In their defence, McGregor, et al., set up that the large profits derived from the tea freights alone enabled them to keep up a regular line of communication between China and England all the year round, and that without a practical monopoly of the tea trade such uninterrupted communication must cease. It was held that the association, being formed by the defendants for the purpose of keeping the trade in their own hands, and not with the intention of ruining the trade of the plaintiffs, or through any personal malice or ill-will towards them, was not unlawful, and no action for conspiracy was maintainable. This decision was subsequently affirmed on appeal to the House of Lords. (See Reports 1892 A. C., page 25.)

"Canute. But on ordinary principles of law, no such "fetter on freedom of trade can, in my opinion, be "warranted. A man is bound not to use his property "so as to infringe upon another's right. *Sic utere tuo "ut alienum non laedas. If engaged in actions* which "may involve danger to others, he ought, speaking "generally, to take reasonable care to avoid endanger- "ing them. But there is surely no doctrine of law "which compels him to use his property in a way that "judges and juries may consider reasonable: See "Chasemore vs. Richards. If there is no such fetter "upon the use of property known to the English Law, "why should there be any such a fetter upon trade?"

Lord Bowen, of course, distinguishes the Common Law rules as to monopolies and wrongful acts, and closes by saying:[93] "I myself should deem it to be a "misfortune if we were to attempt to prescribe to the "business world how honest and peaceable trade was "to be carried on in a case where no such illegal ele- "ments as I have mentioned exist, or were to adopt "some standard of judicial 'reasonableness' or of 'nor- " 'mal' prices or 'fair freights,' to which commercial "adventurers, otherwise innocent, were bound to con- form." And Lord Justice Fry adds:[94] "To draw a "line between fair and unfair competition, between "what is reasonable and unreasonable, passes the power "of the Courts." He then refers to the repeal of the same English Statutes treated by Chief Justice White in the Standard Oil opinion, because it had been found that such restraints substituted for freedom and competition "had a tendency," as he says, "to discourage "the growth and to enhance the price of the same (*i. e.*,

[93] See Mogul Steamship Co. vs. McGregor, 23 Q. B. D., page 620.

[94] Mogul Steamship Co. vs. McGregor, id. (at page 625).

"of commodities). This statement is very noteworthy. "It contains a confession of failure in the past; the in- "dication of a new policy for the future." [95]

In the House of Lords, continual enforcement of this doctrine is reiterated. Lord Chancellor Halsbury [96] quotes with approval Lord Bowen's opinion in the Court below.[97] Lord Watson says: [98] "I cannot for "a moment suppose that it is the proper function of "English Courts of Law to fix the lowest prices at "which traders can sell or hire. * * * In the first "place, it was impossible that any honest man could "impartially discharge his duty of finding freights to "parties who occupied the hostile position of the appel- "lants and respondents." Lord Bramwell observes: [99] "What is the definition of fair competition? What is "unfair that is neither forcible nor fraudulent? It "does seem strange that to enforce *freedom* of trade, of "action, the law should punish those who make a per- "fectly honest agreement with a belief that it is fairly "required for their protection"; and ends by quoting

[95] See opinion of Lord Fry in Mogul Steamship Co. vs. McGregor, 23 Q. B. D. (at page 629). These English Statutes, known generally as the acts punishing "badgering, forestalling, regrating and engrossing," were repealed as to their criminal provisions in the reign of George III (12 Geo. 3.C.71), because the restraints laid by the statutes upon dealing in corn, meal, flour, cattle and other victuals were found to increase the price of the same to the public. Further and more general removal of all such restraints were made by the statutes passed in the reign of Victoria (7 and 8 Vitc. C 24; 34 and 35 Vict. C 31, and 39 and 40 Vict. C 22), and thereafter such matters were left to the common law unaided. These statutes, as stated in the text, were discussed in some detail by Chief Justic White in his opinion in the Standard Oil case, because of their analogy and important bearing upon restraint of trade legislation in ths country.

[96] Mogul Steamship Co. vs. McGregor, on appeal to the House of Lords. Reported 1892 A. C., page 25.

[97] Id., 1892 A. C., page 37.

[98] Id., 1892 A. C., page 43.

[99] Id., 1892 A. C., page 47.

Lord Justice Fry: "To draw a line between fair and "unfair competition, between what is reasonable and "unreasonable, passes the power of the Courts." Lord MacNaghten concurred in the decision, and finally Lord Morris says:[100] "I cannot see why judges should "be considered specially gifted with prescience of what "may hamper or what may increase trade, or of what "is to be the test of adequate remuneration. In these "days of instant communication with almost all parts "of the world, *competition is the life of trade,* and I "am not aware of any stage of competition called 'fair' "intermediate between lawful and unlawful. The "question of 'fairness' would be relegated to the "idiosyncrasies of individual judges." And Lord Field concurred upon the grounds stated by Lord Justices Bowen and Fry, Lord Hannen also concurring.

For the Supreme Court, therefore, to abandon the position so clearly taken by it, *that trade cannot be made free by tying up traders by a requirement that they should conduct their business under the threat of a criminal punishment if they did not successfully do what all these great Judges, both American and English, have determined was beyond their power,* would be a violation of both the Fifth and Sixth Amendments of the Constitution of the United States, and would, by destroying the one sure remedy for high prices—that is free competition—effectively tend to make them permanent.

---

[100] Id., 1892 A. C., page 50.

CHAPTER V.

Prices Cannot Be Made Fair by Governmental Regulation.

The present inquiry necessarily leads to an ascertainment of whether experience has not already demonstrated not merely the dangers, but the fallacy of believing that the only effective way of fixing a fair price for commodities is by *an usurpation of the fundamental right* and liberty of the whole community, through barter, to fix such reasonable prices,—to determine what are proper prices through the "higglings of the market"; whether, the traditions of our race have not been wisely followed in excluding an arbitrary monopolistic price, as against *the people's price,* whether determined by a small or even as great a combination as the Government itself.

Men enter that form of "the pursuit of happiness" called "business" for the purpose of profit. Their exertions are stimulated in proportion to their hopes. This lies at the foundation of the law of supply and demand. The initial fallacy, which the law has so far exposed, is in assuming that *high prices* are necessarily *excessive prices*; for high prices are under a state of freedom and in the absence of restraints, whether by Government or any one else, *the sole permanent cure for scarcity.* Competition is as automatic as the thermometer. Where free, by fluctuation in price resulting from it, it brings about both the necessary reduction in consumption, and in turn supplies the vital stimulant to production. Why is it that, notwithstanding

the law of decreasing returns, sugar that in early days could not be bought for $1.00 a pound, has, in ordinary times, become one of the cheapest of commodities? The answer is obvious. The high price stimulated investment of capital, and the application of invention, genius and intense energy, which, in turn, stimulated production and the *consequent* competition that resulted in the decline always following. Exactly this same law is operating now, and it will result in a like inevitable decline. See how fully this economic law is exemplified in the present market of the leather and silk industries. Though, if the results of the investigation of all great economists be not incorrect, this decline is being retarded now only by the dangers and annoyances created by governmental power. Of course, it does not tend either to courage or clarity of judgment for a business man who may be making a thousand sales a day to fear that he may unwittingly be committing an equal number of criminal offenses, that may subject him to heavy penalties of fine and imprisonment, if some District Attorney and jury, *desirous of getting bargains,* might decide that he should have charged less for the commodities that he has sold. Indeed, if such be the law, and it be enforced—it cannot be impartially enforced, for all the judges, juries and district attorneys could not possibly pass upon the multitudinous cases that must arise and need investigation. Under such circumstances trade must stop, or become a mere criminal lottery.

As John Stuart Mill says:[101] "Insecurity paralyzes, only when it is such in nature and in degree, "that no energy, of which mankind in general are "capable, affords any tolerable means of self-protection. And this is a main reason why oppression by

[101] See Mills' Political Economy, Vol. 2, page 384.

"the government, whose power is generally irresistible, "by any efforts that can be made by individuals, has "so much more baneful an effect on the springs of "national prosperity, than almost any degree of law- "lessness and turbulence under free institutions. "* * * but no countries in which the people were "exposed without limit to arbitrary exactions from the "officers of government, ever yet continued to "have industry or wealth." Continuing, Mr. Mill says:[102] "*All* that governments can do in these emer- "gencies, is to counsel a general moderation in con- "sumption, and to interdict such kinds of it as are not "of primary importance. * * * A limitation of "competition, however partial, may have mischievous "effects quite disproportioned to the apparent cause. "* * * When relieved from the immediate stim- "ulus of competition, producers and dealers grow "indifferent to the dictates of their ultimate pecuniary "interest; preferring to the most hopeful prospects, the "present ease of adhering to routine."

And Mr. Mill forcibly points out how deleterious it is always to deprive people of the education, the creation of energy, independence and self-control, that result from their freely conducting their own business affairs: "There cannot be," he says,[103] "a combination of "circumstances more dangerous to human welfare, than "that in which intelligence and talent are maintained at "a high standard within a governing corporation, but "starved and discouraged outside the pale. *Such a* "*system, more completely than any other, embodies the* "*idea of despotism.*"

Out of a multitude of like considerations, two, at

---

[102] Mills, Political Economy, Bk. III, Chap. III, Sec. I (Vol. II, page 433).

[103] Mills, Political Economy, Vol. II, page 450.

least, should not be passed without attention. The trade principles under discussion certainly have recognition in the constitutional provisions as to patents, that go to the extent of even creating monopolies. Such monopolists have not only a common right of determining their prices for their products, but they have a right of action against any one who dares compete with them. This has, however, always properly been held necessary and just, because the public *forever after* has the benefit resulting from the energy and improvement thus incited. But in their totality such inventions are trivial in comparison with those created by the stimulus of competition and increased production, which are never patented or extensively known. Such are the inventions, improvements and devices which are developed from day to day in the course of industry and business, and are directly attributable to the vitalizing forces which unfettered competition and freedom in trade nurse into being. Such single accretions may, in themselves, be relatively insignificant, but in their totality they are enormous. To say, therefore, that these benefactors to industry and trade are *not* to have the benefit and reward for the short period that competition does *not* take it away from them, but are even to be treated as criminals for taking the reward thus justly earned, is to violate the whole spirit of the Constitution.

Again, like considerations apply to what is called "turnover." The investigations made by Harvard University show that the variation in this respect between competitors is enormous. Of course, the obtaining of an adequate supply, which the Act looks to, is enormously aided by stimulating the profits resulting from multiplied output. If by industry, improvement and invention, a plant producing 1,000 barrels a day

of a commodity can be increased, without increase of cost to the consumer, to 10,000 barrels a day, it is of enormous advantage to the public whether there be an immediate decrease in price or not. The stimulus, therefore, that should be given, for such increase of production must not only reduce scarcity, but must increase competition, and ultimately reduce prices. To say, therefore, that the seeking of this legitimate and highly beneficial reward, even for the short time it can be enjoyed, is to imperil a man in all the dangers of criminal prosecution, is to say that which is economically unsound. An exceedingly interesting discussion of this matter by Mr. Carl Snyder is to be found in the March-April 1920 Number of McClure's Magazine.[103a] He says, in part: "There has been one Bureau "at Washington whose aggregate expenses now run "beyond a million dollars, that has seemed to make its "especial business distilling into the public mind every "kind of vicious idea about business. * * * It has "sent out report after report showing the enormous "profits of this or that company or trade. But what "kind of profit? Always the profits on the invested "capital! Rarely, if ever, have these profits been fig-"ured on gross sales. Why? Because, however large "the profits cited have been, on the invested capital, "the average profits on sales have been something on "the order that I have given above, usually less than "five or six per cent., often half this, and in the case "of the criminal band of meat packers, known as the " 'Big Five,' they have often been below two per cent. "And this brings us to the very heart of the question "of 'profiteering.' I make bold to say that the public "has relatively little interest in the earnings upon cap-

[103a] "McClure's Magazine," March-April, 1920, page 23, article entitled "Who is Profiteering?"

"ital, and, in any event, a great deal less than in the "question of the business ability of his butcher and "baker and corner groceryman. It will often happen "that one dealer will make two or three times as much "on his invested capital as his neighbors and com- "petitors, and yet sell his goods to the public at a lower "price, or, what is the same thing, sell better goods for "the same money. He will do this because he under- "sells his competitors. The matter is simply this: "Some merchants will turn their capital over, ten, fif- "teen, twenty, and even twenty-five times a year (in "the case of some retail grocers). Others only four or "five times. That is their year's sales will total five, "ten or more times the sum they have invested. The "Harvard Bureau, which I have quoted, found that "the average turnover in the retail grocery trade was "about eight times a year. But the actual range was "from twenty-seven times down to less than two times. "Now, here was a very remarkable fact. In the Har- "vard Bureau Reports, the grocery store with the low- "est cost of doing business had a turnover of nearly "nineteen times a year. And, in general, *the higher "the turnover, the lower the day's expenses, and, there- "fore, lower prices to the public.* * * * Natural "monopolies and powerful combinations may perhaps "very justly be brought under governmental control "or restraint, *though experience has shown that rarely, "if ever, have such attempts been other than disastrous, "and meant a yet higher cost to the public in the long "run.* But, in the case of ordinary commodities, the "action is automatic and cannot fail. * * * The "price of things—alike of goods, service, and every- "thing that money can buy—is indeed the most ex- "quisite bit of psychology in the world. At a certain "price, a certain number of people will buy a given

"article. Raise the price of this article without rais-
"ing the purchasing power and the demand will fall off.
"This was true from the beginning of human barter
"and trade, and this will be true down to the last set
"of human beings who burn the last bit of fuel avail-
"able upon a cold and exhausted earth. It can never
"be otherwise; and if it were not so, to all intents,
"human trade and barter would be impossible. This
"is the pivotal fact upon which the commerce and
"industry of the whole wide world, mounting now into
"hundreds of billions of dollars in volume, rests."

Manifestly, prices fixed *by the whole world* in its untrammeled and free markets have thrown about them, certainly so far as the trade and commerce of this country are involved, the protection of the Constitution of the United States, and for the Act to declare them when thus fixed unreasonable and excessive would be confiscatory. The Courts having, prior to the time of the Constitution, defined what is just and reasonable compensation, or, as the Constitution defines it, "*fair compensation*," now by statute to deny this meaning, so long established, must be in plain defiance of the Constitution, as well as all historical and economic precedents.

Returning from this digression to the subject under inquiry. The etymology of the word "competition" is perfectly obvious. People compete when they seek an object together. In its legal sense and significance, it is an act directed to the purpose of acquiring a common thing or end individually and as against others. It will later be shown that, so far as price fixing of commodities is concerned, this common seeking, because of the enormous difficulties of the subject, is the only practical and effective method. Indeed, not merely that the law permits it, but requires it as essen-

tial to the preservation of constitutional liberty. The Supreme Court, in its recent opinion in the case of United States vs. Union Pacific R. R. Co.,[104] unanimously and succinctly says: "To compete is to strive "for something which another is actively seeking and "wishes to gain. * * * To preserve from undue "restraint the free action of competition * * * was "the purpose which controlled Congress in enacting "this statute,[105] and the Courts should construe the law "with a view to effecting the object of its enactment. "Competition * * * consists not only in *making* "*rates* * * *, but includes the character of the "service rendered. * * * The consolidation * * * "creates a combination which restrains interstate com- "merce within the meaning of the statute, because, in "destroying or greatly abridging *the free operation of* "*competition theretofore existing, it tends to higher* "*rates.*"

Again the same tribunal says, in the case of the United States vs. Reading Company:[106] "The evil is "the combination. Without it the several groups * * * "have the power and motive to compete. *That each* "*may for itself advance the price* * * * *or cut down* "*the production, is true. But in the power which each* "*other group would have to compete would be found a* "*corrective.*"

A very valuable statement of this truism is to be found in the unanimous opinion of one of the *ablest* Courts[107] in the United States, Mr. Justice Van De-

---

[104] United States vs. Union Pacific R. R. Co., 226 U. S. 61 (see page 87). 1912.

[105] The Sherman Anti-Trust Law, Act of Congress of July 2nd, 1890.

[106] United States vs. Reading Company, 226 U. S. 324 (at page 353). 1912.

[107] United States Circuit Court of Appeals for the Eighth Circuit.

vanter, now of the Supreme Court, participating as a Circuit Court Judge. In this case, Whitwell vs. Tobacco Co.,[108] the fundamental principle is thus, again, announced: "The right of each competitor *to fix the* "*prices* of the commodities which he offers for sale " * * * *is indispensable to the very existence of* "*competition. Strike down or stipulate away that* "*right, and competition is not only restricted, but* "*destroyed.* * * * Contracts of competitors in the "production or sale of merchantable commodities *to* "*deprive* each competitor of the right to fix the prices "of his own goods, the terms of the sale, or the cus- "tomers to whom he shall dispose of them, and either "to fix these prices, terms, and customers by the agree- "ment of the competitors, or to intrust the power to "dictate them, * * * necessarily have the effect "either to stifle competition entirely, or to directly and "substantially restrict it, because such contracts de- "prive the rivals in trade of their best means of insti- "tuting and maintaining competition between them- "selves. * * * Each had the right to fix the prices "at which it would dispose of them, and the terms upon "which it would contract to sell. * * * There is "nothing in the Act of July 2nd, 1890, (Sherman Anti- "Trust Act), which deprived any of these competitors "of these rights. *If there had been, the law itself* "*would have destroyed competition more effectually* "*than any contracts or combinations of persons or* "*corporations could possibly have stifled it.* The ex- "ercise of these undoubted rights is essential to the "very existence of free competition, and so long as "their exercise by any person or corporation in no way "deprives competitors of the same rights, or restricts

[108] Whitwell vs. Continental Tobacco Co., 125 Fed. Rep. 454 (at page 459). 1903.

"them in the use of these rights, it is difficult to per-
"ceive how their exercise can constitute any restriction
"upon competition or any restraint upon interstate
"trade. The acts of the defendant * * * are
"nothing more than the lawful exercise of these un-
"questioned rights *which are indispensable to the ex-*
"*istence of competition or to the conduct of trade.*
"* * * An attempt by each competitor to monopo-
"lize a part of interstate commerce is the very root of
"all competition therein. Eradicate it, and competi-
"tion necessarily ceases—dies. Every person engaged
"in interstate commerce necessarily attempts to draw
"to himself, and to exclude others from, a part of that
"trade; and, if he may not do this, he may not com-
"pete with his rivals, all other persons and corpora-
"tions must cease to secure for themselves any part of
"the commerce among the States, and some single cor-
"poration or person must be permitted to receive and
"control it all in one huge monopoly. The purpose of
"the Act of July 2nd, 1890, was, however, to prevent
"the stifling of competition, not to destroy it or to fos-
"ter monopoly, and any construction of any of its pro-
"visions which would give it such an effect is unreason-
"able and inconsistent with the object and spirit of the
"law. It is an interpretation which fosters the mis-
"chief it was passed to remedy."

The foregoing sound reasoning by the Court as shown in this statement of legal and economic principles, may be applied with peculiar force to the Lever Act, affording a true guidance, not only in seeking its intendment, but also in prescribing a liberal interpretation of its terms necessarily involved in the act of enforcing it.

An important case upon the question of the right of the owner to fix the price of his commodities in his

own free discretion in the course of free competition is that of United States vs. Colgate,[109] for not only is there cited therein an ample collection of authorities, including decisions of the Supreme Court, but the case itself was affirmed on appeal to the Supreme Court.[110] Judge Waddill, in the lower Court, says:[111] "* * * how "far one may control and dispose of his own property; "that is to say, whether there is any limitation thereon "if he proceeds in respect thereto in a lawful and bona "fide manner. That he may not do so fraudulently, "collusively, and in unlawful combination with others, "may be conceded. * * * But it by no means fol- "lows that, being a manufacturer of a given article, "he may not, without incurring any criminal liability, "refuse absolutely to sell the same at any price, *or to "sell at a named sum to a customer.* * * * *Author- "ities to sustain this view might be cited almost with- "out number.*" After citing many cases, he continues:[112] "The indictment should set forth such a state "of facts as to make it clear that a manufacturer, en- "gaged in what was believed to be the lawful conduct of "his business, has violated some known law, before it "is haled into Court to answer the charge of the com- "mission of a crime. In the instant case, the Court's "conclusion is that the averments of the indictment, "* * * *read in the light of the defendant's inalien- "able right to deal lawfully with his own property, the "handling, trading in, and disposing of which is made "the subject of this indictment, fail to charge any of- "fense, either in restraint of trade and commerce, un- "der the Sherman Act, or any other law of the United "States.*"

---

[109] United States vs. Colgate, 253 Fed. Rep. 522. 1918.
[110] United States vs. Colgate, 250 U. S. 300. 1919.
[111] Id., 253 Fed. Rep. (see page 525).
[112] Id., 253 Fed. Rep. (see page 528).

The Supreme Court quotes largely from this opinion. It says:[113] "The retailer, after buying, could, if "he chose, give away his purchase, or sell it at any price "he saw fit; * * * his course in these respects be- "ing affected only by the fact that he might by his ac- "tion incur the displeasure of the manufacturer," etc. Indeed, this language is quoted twice in the opinion by the Supreme Court, which then says:[114] "The pur- "pose of the Sherman Act is to prohibit monopolies, "contracts and combinations which probably would "*unduly interfere with the free exercise of their rights* "*by those engaged, or who wish to engage, in trade and* "*commerce—in a word, to preserve the right of free-* "*dom to trade.* In the absence of any purpose to cre- "ate or maintain a monopoly, *the Act does not restrict* "*the long recognized right of a trader or manufacturer* "*engaged in an entirely* private business, freely to ex- "ercise his own independent discretion as to parties "with whom he will deal. *And, of course, he may an-* "*nounce in advance the circumstances under which he* "*will refuse to sell.*" The Colgate case was one where a dealer not only fixed the prices of the articles which he manufactured and sold, but went still further and refused to deal with others who would not maintain the prices which he had established for his goods. In the recent opinion of Mr. Justice McReynolds in United States vs. Schrader's Sons,[115] a case where an effort was made to fix and hold a uniform price for an article, he says: "The evil is, indeed, as it always has been to take "away dealers' control of their own affairs, and thereby "destroy competition, and restrain the free and natural "flow of trade."

---

[113] Id., 250 U. S. (at page 306).

[114] United States vs. Colgate, 250 U. S. (at page 307).

[115] United States vs. Schraders' Sons, Inc., 252 U. S. 85 (see page 100). Decided March 1st, 1920.

I hesitate to quote Professor Fisher's "Stabilizing the Dollar," published this year, because of the difficulty of resisting a re-printing of the whole work, but one passage I must include in this review. He says:[116] "It will do no good, of course, to rail at the lucky win- "ners in the lottery. The public was greatly mistaken "in attributing low prices to the 'strangle-hold' of "wicked bondholders, and is equally mistaken today "in attributing high prices to the personal turpitude of "profiteers. * * * How can we blame a business "man (especially one who, as an officer of a corpora- "tion, acts in the interests of others whose capital he "is managing) for getting the best prices he can? We "cannot expect him to sell below the market. In fact, "if market conditions cause profits to fall into his lap, "he would be recreant in duty to throw them away."

However true this may be, it is unfortunate that Professor Fisher, although it was not relevant to the purpose of his book, did not use his illuminating mind to show how great such failure of duty would really be; for, where a business is a continuing one, such profits are always more than apt to be entirely illusory, and ultimately absolutely necessary to balance inevitable loss!

Let us refer again for a passing moment to the hypothetical case of the sugar refiner, which was discussed in Chapter I. Raw sugar advanced in price within the past year from five to ten cents per pound, and thence to twenty cents per pound, and even still further. If the refiner sold his sugars at a reasonable profit on the first price of five cents, the inevitable consequence would be that he could "replace" only half of his necessary supplies. And then suppose, this sup-

---

[116] Fisher's "Stablizing the Dollar" (at page 59).

ply, though only one half his requirement, again advanced to twenty cents per pound for raw sugars, and he took but a living profit. He would have come within the Government's contention as to his duty under the terms of the Lever Act, even though each "turnover" in such a course of business, would bring him that degree closer to financial ruin. On the other hand, let us assume that this refiner, when sugar advanced from five to ten cents, based his profit upon that replacement price, and did likewise when the twenty-cent price was reached. Undoubtedly it would be regarded as an atrocious case of profiteering, though for him not to do so would bring his refinery to disaster. And due regard must be given by the refiner to the immeasurable anxieties of taxation and risk of enormous declines in the value of his stock on hand which *must* follow from the stimulus to increase supply arising from such high prices. So that whilst, on the one hand, there may be complaint of prices on the part of consumers, it is safe to say that there is no sugar refinery whose management is not beset with the gravest apprehension under the present conditions, and under the meaning sought to be given to the Lever Act.

As was to be expected, this reversion to what *were* believed obsolete ideas has actually revived the ideas of the mercantile system, which Adam Smith was *supposed* to have forever laid to rest, with all its injurious absurdities.

Jacob H. Hollander, the able professor of Political Economy at Johns Hopkins University, has also called attention to the fact that the Government itself is largely responsible for that supposed form of profiteering, of necessity, appearing in the accounts of every business which held a large stock of goods. Indeed, the supposed offense is really

thrust upon them. He says:[117] "It is a symp-
"tom of the disease, not the disease itself. Profiteer-
"ing is the effect, not the cause of the high cost of liv-
"ing. Those who have been trying to make the Ameri-
"can people believe that profiteering causes high prices
"are in a class with the quacks who will tell a consump-
"tive that his loss of weight is due to his high color,
"instead of saying that both are the symptoms of the
"tissue destroying bacillus. The answer is that infla-
"tion is due to financial mistakes of the Administra-
"tion at Washington, (1) while we were getting ready
"for war, (2) while we were at war, and (3) after the
"war was over. During each of these periods, the
"Treasury permitted, and indeed, encouraged an in-
"crease in the country's money supply, and the certain
"prospect of rising *prices.*"

Surely it would be justifiable reiteration to weigh again the thoughts of Professor Laughlin in his "Money and Prices," to which reference has several times been made. He says:[118] "As a fall of prices inures to the
"benefit of creditors, a rise of prices would inure to
"the benefit of debtors. If it would be wrong to have
"'legislation favoring the creditor class, so it would be
"wrong to have legislation favoring the debtor class.
"'* * * *Think of a civil polity, which in the in-*
"*terest of one set of persons should undertake to*
"*regulate the prices of goods in the country's markets.*
"'* * * *If we are to enter upon that path, it is well*
"*to know whither it leads. One such step in Socialism*
"*leads to another, and the outcome is the subversion*
"*of existing society.* * * * *Shall we accept dis-*
"*honor, or shall we disappear down the unknown path*

[117] Jacob H. Hollander's Article in New York Times of Sunday, May 2nd, 1920, entitled "How Inflation Touches Every Man's Pocketbook."

[118] Laughlin's "Money and Prices" (at pages 187, 188 and 189).

"*of Socialism? One or the other must we choose, if* "*the public is pleased to occupy itself in the future* "*with the price question.* * * * And so soon as "the forces operating on price are understood to be "complex, and of a nature not to be interfered with "by legislation, we shall be free from a dangerous "agitation."

The conclusions reached in the foregoing authorties show convincingly that upon this subject matter our contemporary thought, both from the angle of the law and political economy, is in harmony with the development of English opinion as expressed in the decision of Lord Justice Bowen in the Mogul Steamship Company case, referred to at length in the foregoing pages. The comprehensive analysis and helpful discussion of the very considerations paramount in this inquiry make relevant one further allusion to this classical opinion. "What then," Lord Bowen says,[119] "are the limitations which the law imposes on a trader "in the conduct of his business? * * * His right to "trade freely is a right which the law recognizes and en- "courages. * * * No man, whether trader or not, can, "however, justify damaging another in his commercial "business by fraud or misrepresentation. Intimidation, "obstruction, and molestation are forbidden; so is the "intentional procurement of a violation of individual "rights, contractual or other. * * * But the de- "fendants have been guilty of none of these acts. They "have done nothing more against the plaintiffs than "pursue to the bitter end a war of competition waged "in the interest of their own trade. * * * I can "find no authority for the doctrine that such a com- "mercial motive deprives of 'just cause or excuse.'

[119] Mogul Steamship Co. vs. McGregor, 23 Q. B. D. 611; 1892 Appeal Cases 25. (See 23 Q. B. D., at page 614.)

"* * * All commercial men with capital are ac-
"quainted with the ordinary expedient of sowing one
"year a crop of apparently unfruitful prices; * * *
"and until the present argument at the Bar, it may be
"doubted whether * * * merchants were ever
"deemed to be bound by law to conform to some imagin-
"ary 'normal' standard of freights or prices, or that
"Law Courts had a right to say to them in respect of
"their competitive tariffs, 'Thus far shalt thou go and
"no further. * * * I myself should deem it to be
"a misfortune if we were to attempt to prescribe to
"the business world how honest and peaceable trade
"was to be carried on in a case where no such illegal
"elements as I have mentioned exist, or were to adopt
"some standard of judicial 'reasonableness,' or of
" 'normal' prices, or 'fair freights,' to which commer-
"cial adventurers, otherwise innocent, were bound to
"conform."

Mr. Justice McKenna, in the often followed opinion delivered in the National Cotton Oil case, well says:[120] "Its (monopoly's) dominant thought now is,
"to quote another, 'the notion of exclusiveness or
" 'unity'; in other words, the suppression of competi-
"tion by the unification of interest or management, or,
"it may be, through agreement and concert of action.
"And the purpose is so definitely the control of prices
"that monopoly has been defined to be 'unified tactics
" 'with regard to prices.' It is the power to control
"prices which makes the inducement of combinations
"and their profit. It is such power that makes it the
"concern of the law to prohibit or limit them. And
"this concern and the policy based upon it * * *
"has expression * * * in a well-known national

[120] National Cotton Oil vs. Texas, 197 U. S. 115 (see page 129). 1905.

"enactment. * * * *competition, not combination,* "*should be the law of trade.*"

And so is established the proposition that the Statutory and Common Law, in relation to public policy, is that the public welfare is best served by giving the power and liberty of price fixing as to commodities to *the whole body* of our people, worked out through competition, and protected from control by any lesser group or groups, or even the Government itself. This has all resulted from the demonstration by experience, as is stated in the Northern Securities case:[121] "That the "natural effect of competition *is to increase commerce,* "and an agreement whose direct effect is to prevent "this play of competition *restrains* instead of *promotes* "trade and commerce." To such an extent, indeed, did it prevent trade, that it became necessary to constitute it a criminal offense to do those things that by their necessary operation tend *"to deprive the public of the advantages that flow from free competition."*

Mr. Justice HOLMES, in the same case, points out that: "At times Judges need for their work the train- "ing of economists and statesmen, and must act in view "of their foresight of consequences."

Indeed, no tribunal has been more conscious of this necessary point of view than the Supreme Court itself, as is shown by its decisions hereinbefore referred to, and particularly in the Knoxville Water Company case,[122] where the Court by a unanimous opinion points out the impropriety of guesses as a basis of judicial action, and gives warning that values would become unsettled and confidence destroyed by denying to private property its just reward.

---

[121] Northern Securities Company vs. United States, 193 U. S. 197 (see page 331). 1904.

[122] City of Knoxville vs. Knoxville Water Co., 212 U. S. 13. (Discussed in Chapter I.) 1909.

Of course, the Knoxville Water Company case involved an enterprise necessarily non-competitive and monopolistic by nature,—a class of cases both limited and, from their very character, requiring State control; but it has now been demonstrated by actual results that even in this simple and limited class of cases, there could not be a solution without the aid of everybody, and that aid, having failed the Court, the disaster predicted by it has now to be faced. Taxation to make up the consequent deficits must run into large sums of money; the dislocation of business from inadequate transportation facilities to even greater sum; and the final results of checked enterprise and impaired development must inevitably follow. One almost wonders whether even in the necessary monopolies, it would not have been better to have left them to that free competition through which Liberty works to best results. But can any one reasonably conclude that even economically it is well or even possible, in relation to commodities where a still more flexible adjustment is imperative, to throw the ultimate determination of the millions of daily transactions upon the Supreme Court of the United States? Apart from the fact that no Court, even of supermen, could ever transact all the business of the United States, it is equally clear that that business could not be carried on if, with the hourly fluctuations that must take place in the value of commodities, every dealer in them must wait for the time necessary to ascertain whether he was legitimately engaging in business or had committed criminal offenses beyond number.

Professor Laughlin upon this subject calls attention to one of the peculiar results of rate fixing in relation to monopolies, saying:[123] "It is a strange develop-

[123] Laughlin's "Money and Prices," page 161.

"ment—indeed, a curious travesty on justice—that the "railway, which, by reason of its low cost of transpor- "tation, has practically destroyed the farming interests "of the East, should be regarded by the farmer of the "West as the vampire sucking out the blood of his "agricultural profits; and yet the Western lands could "have been opened to seaboard markets only by means "of it and its low rates. The Eastern farmer must "justly regard the railway, and the resultant competi- "tion of the richer farm land in the West, as the cause "of his ruin and the force which has driven him to new "employments; yet the Western farmer would not now "be in existence if it were not for the railway. The "proof that it has served the Western farmer well is "to be found in the sad ruins of Eastern agriculture." And Professor Laughlin might have added to this that even now in his new occupation, the Eastern farmer, as well as the rest of the community, has to be enormously taxed to pay for the inadequacy of the returns to those who have thus aided in his ruin.

To the writer it seems that only second to the dangers of destroying Liberty is the danger of overburdening the Supreme Court of the United States. It was America's greatest invention in government—that it should be respected, even revered, is in the same degree of importance in the safeguarding of Liberty as that free competition should not be disturbed as the only safe method of fixing commodity prices. It is futile, therefore, to attempt to place upon it duties impossible of performance. Nor as shown by the cases might the Court take kindly to having thrust upon it the task of becoming the final arbiter in the "pricing" of commodities. The thinker may understand that the fault was legislative, not judicial, but the mass of men will always feel that there is nothing so unsuccessful or

discouraging as failure, and will attribute that failure to the final actors. Much could be added to show the impossibility of replacing any body, any government or governmental agency as a successful substitute for all the peoples of the world, acting jointly and by means of free competition, as the price fixers of non-monopolistic commodities.

CHAPTER VI.

The Act in Relation to the Uncertainties in Trade.

The great question that presents itself under this heading is—"how much must be guessed" in business? How many elements must be risked? The difficulty, under present conditions, consists not in finding instances in trade where the purest speculation and surmise are essential, but in deciding how many of these may be treated without overburdening the subject.

Economic decisions are self appealing, being founded on natural law. Human law cannot vary the inevitable results that follow human errors. In the end we are inevitably controlled by the uncontrollable, and part of that law is that nothing more decreases production, with its consequent increase of prices, than *uncertainty.* And we have uncertainty to the *n*th power when ordinary commodities, that are capable of unlimited production, are being dealt with in free and untrammeled competition. If this be but clearly kept in mind and made the touchstone, no other classification seems imperative. There are those who think it but a matter of nomenclature. That if the legislative power or some other proper authority but decree that certain things be called *public utilities,* thereby it changes the whole natural law, and that anything can be regulated in the same way. But that is placing the cart before the horse and asserting that the mere name brings about the constant distinction between these two classes, and not the economic differences. If, however, there ever has been a time when there was no excuse for falling into such error, it is the present.

In the case of commodities, the distressing preponderance of failure is easily accounted for. The lowest

price for which men can safely sell goods, with the hope of remaining solvent, is the price fixed by the correct guess at what they can continually replace them, plus two additional sums. First, when goods are high, the amount below the normal, to which they are bound to fall; and, second, the amount that will carry them over the depressed period that is sure to follow all periods of inflation. What always happens when scarcity appears is that "the trade," indeed the whole world, insists upon the *duty* of increased production. As a result, wages and everything necessary in production advance. Costs sink to a second place. People having been frightened inevitably hoard, and finally when the joint effort of the world oversteps the market, there come the collapses called "panics," and thousands of business men are swept to ruin. Thus scarcity is the true mother of panic. It has always been the inherent nature of such transactions. It may be called "overproduction," or "inflation," or by any other name, but there must be insurance against it, or widespread disaster will follow. Most commonly the estimate of such insurance tends to be fixed too low in the fierce conflicts of free competition, not too high, and the estimated price is in reality a large part insurance against that which is inevitable and uncertain only as to time of its actual occurrence.

On the other hand, in the properly so-called public utility cases, where competition is eliminated, where the chief element is plant, and commodities but enter to a limited extent, and, where, as Mr. Justice Peckham points out,[124] "*risk* is reduced, almost reduced to a minimum," public regulation, however unsatisfactory, is at least possible. This is true even though commod-

[124] Wilcox vs. Consolidated Gas Co., 212 U. S. 19 (see page 49), 1909.

ities used by public utilities do become a minor factor in the calculation. When on the other hand War or other cause makes the commodities used a superior factor, the system must break down, because of this overmastering difficulty. So it was absolutely necessary for the Government, no matter at what cost, to take over the railroads during the great conflict, in order that there might not be a complete collapse of national sustenance. It can, therefore, easily be seen why there is so much complaint, and so little defense of the excess profits tax, for when the matter is reduced to its fundamental principles, it is found that these taxes are but a depletion of what really is the fund that insures the continuance of the life of American trade. The panic, therefore, that may result from so uneconomic a method of taxation, may easily be of the most disastrous character in our history.

It may be well in this connection, though it involves restatement, to recapitulate some of the leading principles which it has been the endeavor to establish in the preceding chapters. Had any student of economic principle been told that since Adam Smith published his work, in 1776, there could possibly be a recrudescence of the theories of the mercantile system, he would not have been believed. And, yet, that is exactly what is taking place and constitutes the chief difficulty in the cases that have been before the courts. To say that such a difficult economic problem can be reduced to the simple formula: "What did you pay for a specific lot of goods in money, and how much did you get for it in money" is to make the most complex question imaginable one of the utmost simplicity. Indeed, it is almost as simple as it is impracticable and erroneous. It might have been safely assumed that in this day, at least, every one was aware "that all trade in the

"last analysis is simply what it is in its primitive form "of barter, *the exchange of commodities for commodi-* "*ties.* The carrying on of trade by the use of money "does not change its essential character, but merely per- "mits the various exchanges, of which trade is made up, "to be divided into parts or steps, and thus more easily "effected. When commodities are exchanged for money, "*but half a full exchange is completed.* When a man sells "a thing for money, it is to use the money in buying "some other thing—and it is only as money has this "power that any one wants or will take it."

Well is it said by Mr. Mill:[126] "Almost every specu- "lation respecting the economical interest of a society "thus constituted, implies some theory of Value; *the* "*smallest error on that subject infects with correspond-* "*ing error all our other conclusions; and anything* "*vague or misty in our conception of it, creates con-* "*fusion and uncertainty in everything else.* Happily, "there is nothing in the law of Value which remains "for the present or any future writer to clear up; the "theory of the subject is complete. * * * The word "Value, when used without adjunct, always means, in "political economy, *value in exchange.* * * * We "shall henceforth understand * * * by the value or "exchange value of a thing, its general power of pur- "chasing; *the command which its possession gives over* "*purchasable commodities in general.* * * * The "distinction between Value and Price * * * is so "obvious, as scarcely to seem in need of any illustra- "tion. *But in political economy the greatest errors* "*arise from overlooking the most obvious truths.* Sim- "ple as this distinction is, it has consequences with "which a reader unacquainted with the subject would

[126] John Stuart Mill, Political Economy, Vol. I, pages 420 to 424.

"do well to begin early by making himself thoroughly "familiar. The following is one of the principal. There "is such a thing as a general rise of prices. All com- "modities may rise in their money price, but there can- "not be a general rise of values. It is a contradiction "in terms. * * * *Things which are exchanged for "one another can no more all fall, or all rise, than a "dozen runners can each outrun all the rest.* * * * "That the money prices of all things should rise or fall, "provided they all rise or fall equally, is, in itself, and "apart from existing contracts, of no consequence. "* * * *It makes no other difference than that of "using more or fewer counters to reckon by.* The only "thing which in this case is really altered in value, is "money." Well did Lord Coke say: "*Certainty is the mother of quietness and repose,*" or, as has so well been said by the Supreme Court in the International Harvester Case:[127] "Value is the effect in exchange of the "relative social desire for *compared objects* expressed "in terms of a common denominator. * * * But what "it would be * * * *with exclusion of the actual "effect of other abnormal influences,* and, it would seem "with exclusion also of any increased efficiency in the "machines," * * * "is a problem that no human in- genuity could solve."

With our currency's purchasing power of commodities falling to but thirty-five per cent. of its prior value, as has been pointed out by Professor Fisher, the making of these mere counters,—this mere facility for turning the trade in commodities, not only a test, but the final and sole test is not reasonable. In a prior chapter it has been shown how inevitably ruin would follow if business men bought on "*real value,*" and were com-

[127] International Harvester Co. vs. Kentucky, 234 U. S. 216 (see page 222). 1914.

pelled to sell on *"price,"* even without the added difficulty of our depreciated and ever fluctuating currency. This is but one of the innumerable problems *"that no human ingenuity could solve."*

Another, and, indeed, the most difficult element in business enterprise is *"risk."* As has been pointed out, if not entirely overlooked, it has been completely ignored, and, yet, it is one of the chief considerations of all Political Economists. It has been definitely determined to be an absolutely essential consideration by the Supreme Court, even in rate cases concerning public utility monopolies. Adam Smith, again and again, treats of it with the greatest clearness. It would require much space to quote all he says on the subject. A few passages will suffice. He observes:[128] *"Profit "is so very fluctuating that the person who carries on a "particular trade cannot always tell you himself what "is the average of his annual profit. It is affected not "only by every variation of price in the commodities "which he deals in, but by the good or bad fortune both "of his rivals and of his customers, and by a thousand "other accidents to which goods when carried either by "sea or by land, or even when stored in a warehouse, "are liable. It varies, therefore, not only from year to "year, but from day to day, and almost from hour to "hour. * * * The lowest ordinary rate of profit must "always be something more than what is sufficient to "compensate the occasional losses to which every em-"ployment of stock is exposed.* It is this surplus only "which is called neat or clear profit. What is called "'gross profit' comprehends frequently, not only this "surplus, but what is retained for compensating such "extraordinary losses. * * * *The chance of loss is "frequently undervalued and scarce ever valued more*

[128] Adam Smith's "Wealth of Nations," Book I, Chap. IX.

"*than it is worth.* * * * In all the different employ-
"ments of stock, the ordinary rate of profit varies more
"or less *with the certainty or uncertainty of the re-*
"*turns.* * * * The ordinary rate of profit always
"rises more or less with the risk. *It does not, however,*
"*seem to rise in proportion to it, or so as to compensate it*
"*completely.* * * * The presumptuous hope of suc-
"cess seems to act here, as upon all other occasions, and
"to entice so many adventurers into those hazardous
"trades, that their competition reduces their profit be-
"low what is sufficient to compensate the risk. To com-
"pensate it completely, the common returns ought, over
"and above the ordinary profits of stock, not only to
"make up for all occasional losses, but to afford a sur-
"plus profit to the adventurers of the same nature with
"the profit of insurers. But if the common returns
"were sufficient for all this, bankruptcies would not be
"more frequent in these than in other trades."[129]

Henry George says:[130] "Of the three parts into
"which profits are divided by political economists—
"namely, *compensation for risk,* wages of superintend-
"ence, and return for the use of capital," &c.

Professor Ely thus states the proposition:[131]
"*Profits differ from other forms of income in the de-*
"*gree to which they are contingent upon successful risk*
"*taking.*"

Professor Laughlin says:[132] " * * * the problem of
"price is one which includes a study of two sets of
"forces: (1) Those influencing *the standard,* and (2)
"those *influencing the commodities in the price lists. A*
"*change in a list of prices, in itself, implies nothing as to*

[129] Adam Smith, "Wealth of Nations," Book I, Chap. X.
[130] Henry George, "Progress and Poverty," Chap. I, page 161.
[131] Richard T. Ely's "Outlines of Economics," Chap. XXV, page 536.
[132] Laughlin's "Money and Prices," Chap. III, page 97.

*"the cause of the change. The originating cause may be "operating upon gold, or upon the goods; or there may "be causes working at once upon both sides, opposing "or co-operating. It is, therefore, unsafe to dogmatize "upon the causes of a change in prices without an in- "vestigation into all the facts touching both gold and "goods. * * * Every owner of capital in its various "forms must always take the risk that invention may "devise something cheaper in operation than his exist- "ing machine."*

Professor Taussig states:[133] *"The independent "conduct of industry is the salient characteristic of the "business man's work.* He assumes the *risks* of the out- "come of industrial operations. * * * This position "as residual claimant explains one striking characteris- "tic of business profits—the irregularity of the income. *"In one year the business man may earn nothing, may "even lose.* Another year he may gain great sums. *The "variations from year to year of the same individual's "profits arise from the business man's assumptions of "industrial risks.* * * * The business man more "especially feels first the effects of changes in prices. *"When prices rise, he gains for awhile; when they fall, "he loses for awhile * * * So great are the risks "of business that many people, again, look upon it all "as a game of chance.* * * * Courage and some de- "gree of venturesomeness are obviously essential to the "successful business man: so much follows from that "assumption of risks, *which is of the essence of his do- "ings.* * * * *Success in business is highly uncertain. "Prediction as to any individual who enters it is ex- "tremely difficult.* * * * *In view of the risks and the "obvious possibilities of failure, must there not be some "prizes to maintain the resort to the occupation?"*

---

[133] F. W. Taussig's Principles of Economics," Vol. II, Chap. 49, pages 158, 159, 160 and 164; also Chap. 50, page 173.

Under the same heading comes, of course, *"Replacement."* Again, all economic thinkers agree. Adam Smith says: [134]"When any expensive machine is erected "the extraordinary work to be performed by it before "it is worn out, it must be expected, will replace the "capital laid out upon it with at least the ordinary profits." And he applies this to trained men as well as to machinery. Professor Turner treats this subject as follows:[135] "* * * * *each item of the "merchant's stock must normally sell at a price which "will replace that item with one of equal price"* (this truth is ignored by those who support an erroneous construction of the Act) "together with a surplus sufficient to cover all the costs of selling it. * * * "*Any item failing to do this is carried at a loss; and "the merchant who continues to carry items at a loss "will see his stock diminish and ultimately disappear.* "Likewise, a manufacturing plant gradually diminishes in worth unless the items composing it produce "a sum sufficiently large *to enable the owner to purchase another item of the same character,* which, in "turn, will produce enough to install its successor. "* * * * upon applying this reasoning to a manufacturing plant, in which heavy fixed capital is involved, "*it will follow that in many cases sudden changes will "involve heavy social losses.*"

Professors Ely and Wicker set forth: [136]"A man "is facing business ruin who takes and consumes as "profits from his plant what should be set aside for its "upkeep and replacement. The same may be said of "the payment to provide against *risk,* which may be

---

[134] Adam Smith's "Wealth of Nations," Book I, Chap. X.

[135] Turner's Introduction to Economics, Chap. 25, page 569.

[136] Ely and Wicker's "Elementary Economics" (Revised), page 359.

"called *insurance. The amount of money which a "careful business man sets aside from the unusual "gains of prosperous years to secure himself against "disaster from losses in lean years is not profit."*

A single plant is known which though now making large contributions to the supply of necessaries, and earning substantial profits that may prove purely *illusory* did not pay any return *for over thirty years.* Could anything better illustrate the absurdity of indictment for its present transactions than the proof that it at last was making a large percentage of profit, especially as the high prices now prevailing must mean more lean years to come?

A most highly instructive instance of the uncertainty of money is given by Professor Fisher: [137]"A "farmer inquired from the manufacturer the present "price of a certain type of buggy, such as he had bought "once before. The price quoted seemed to him out- "rageously high, and he accused the manufacturer of "'profiteering,' reminding him of what the former "price of the buggy had been. The manufacturer "* * * * discovering that the farmer had pre- "viously paid for such a buggy by a shipment of wheat "* * * replied: 'If you will ship to me for the "new buggy the same amount of wheat you shipped for "your old one, I will gladly ship you the buggy, and, "in addition, will ship you a piece of household furni- "ture and a good kitchen stove.' In short, everybody "is eager to take advantage of rising prices, but feels "aggrieved if anybody else snatches the advantage "away. *Thus the high cost of living becomes a veritable "'apple of discord.'* * * * *The fact is that among*

---

[137] Fisher's "Stabilizing the Dollar," Chap. III, Sec. 14, page 73; also Sec. 15, page 75

"*the worst consequences of price convulsions are the "vicious remedies proposed.*"

There is a preponderance of further authority upon the subject, from the writings of economists, but we will turn now to some of the determinative decisions of the Supreme Court upon this phase of our inquiry.

Of course, as has been pointed out by the Supreme Court, where it is dealing with monopolistic enterprises, the rules are far different from those "*concerning the ascertainment of value under contracts of sale,*" as in the Omaha Case[138]. But, even in such cases, the rules stated have been clearly applied, and there is no difference between economic and judicial opinion.

The great distinction rests on the legal principle that the law always requires *the best evidence* possible in every case. The best evidence of price is *market price,*—the price fixed by the joint inquiry and judgment of the world through its free competitive forces. Where that result is thus reached, no other evidence is admissible on the point. On the other hand the best evidence of excessive price is price fixed by monopoly, by private greed. So that it follows inevitably, in those instances where there can be no fair competition, where monopolistic condition is paramount, the State must assume control,—not that this is desirable, nor can ever be satisfactory, but that it is absolutely necessary to prevent a part of the taxing power being exercised by individuals,—and thus establishing "taxation without representation."

Referring again to the Knoxville Case[139], Mr. Justice Moody there said: "Before coming to the question "*of profit at all,* the Company is entitled to earn a suf-

[138] Omaha vs. Omaha Water Co., 218 U. S. 180 (see page 203). 1910.

[139] Knoxville vs. Water Co., 212 U. S. 1 (see page 13). 1909.

"ficient sum annually to provide not only for current "repairs, but for making good the depreciation and "replacing the parts of the property when they come "to the end of their life. *The company is not bound "to see its property gradually waste, without making "provision out of earnings for its replacement.* It is "entitled to see that from earnings the value of the "property invested is kept unimpaired, so that at the "end *of any given term of years* the original investment "remains as it was at the beginning. It is not only the "right of the Company to make such a provision, but "it is *its duty* to its bond and stockholders, and, in the "case of a public service corporation at least, its plain "duty to the public. If a different course were pur- "sued * * * this course would lead to * * * "a disaster either to the stockholders or to the public, "or both."

The Court properly deals with replacement "value" and not merely "price"; and exactly the same rule necessarily applies to "stock" that applies to machinery or any other property. Stock is the real thing, not the counters by which it may at any moment be measured, and the wasting away of that real thing brings the predicted and certain ruin that follows its continuance.

In view of these vital principles, investigation has been made to ascertain the various questions—the "thousand other accidents" spoken of by Adam Smith —that must and only can be guessed at in the sale of commodities. In view of the fact that there has been discussed the opinion of Judge Faris in United States vs. Cohen[140] relating to an indictment under the Act for an alleged unfair price in a sugar sale, an examination has been made into the un-

[140] United States vs. Cohen, 264 Fed. Rep. 218. 1920.

certainties appertaining to the manufacture of that commodity. The mathematical problem reduces itself to this question: "What price must a man ask "for sugar, which, after the deduction of many other "sums which cannot possibly be stated, will leave a "remaining sum that will satisfy any jury that no "more than a reasonable profit has been made?" This problem reminds us of the teasing questions put to children beginning arithmetic, such as: "If a boy had thirteen marbles and his sister gave him a plate of ice cream, how many crows would it take to eat up the corn which his father was going to plant?" Well has the Supreme Court said that such guessing is not a judicial function, that: "To compel men to guess on "peril of indictment what the community would have "given for their wares, if the continually chang- "ing conditions were other than they *are,* to an un- "certain extent; to divine prophetically what the re- "action of only partially determinate facts would be "upon the imagination and desires of purchasers, is "to exact gifts that mankind does not possess."[141]

Of course, the contention as to the Lever Act is that men have so far lost their freedom under it that these "reactions" are no longer to be permitted to take place—an unthinkable proposition to any one familiar with the world of business. We may well ask with the Supreme Court, in United States vs. Trans-Missouri Freight Association:[142] "What is a fair and reason- "able profit? That depends sometimes upon the *risk* "incurred. * * * It is quite apparent, therefore, "that it is exceedingly difficult to formulate even the

[141] From the opinion of Mr. Justice Holmes in International Harvester Co. vs. Kentucky, 234 U. S. 216 (see page 224). 1914.

[142] United States vs. Trans-Missouri Freight Assn., 166 U. S. 290 (see page 331). 1897.

"terms of the rule itself. * * * While even after "the standard should be determined *there is such an "infinite variety of facts entering into the question "* * * that any individual shipper would in most "cases be apt to abandon the effort to show the un- "reasonable character of a charge, sooner than hazard "the great expense in time and money to prove the "fact."

In the case of commodities, the difficulties are a thousandfold greater, and under this merciful Act the business man not only has the expense and trouble mentioned, but, if his business is to go on, *he must make the attempt under the further inducement of knowing that if for any sales he is indicted and brought to trial and the jury should not approve his results, he might go to jail, and suffer consequent loss of business and property.*

If such an interpretation of this statute is a possibility, both Liberty and business will surely die. There is unquestioned power to make and execute laws, but there is no power to do more than pretend to reverse mathematical truths or avoid the results of attempts to defy them. No man can deduct from known quantities the unknown, and, beyond any reasonable doubt, mathematically define the answer.

Let us, again, turn to the Cohen Case.[143] The whole charge was that he had bought sugar at one price and sold it at another. This fact caused the Judge to feel it necessary to guard against the indignation that he felt. But, in the first place, the rule of freedom, under which men have acted for centuries, always allowed a man to ask for his own property, or to offer as much or as little for the goods of another as he chose, and

[143] United States vs. Cohen, 264 Fed. Rep. 218. 1920.

thus, through bartering, to reach that normal price to which markets always tend. "Undoubtedly," said the Supreme Court[144], "as a general rule, the seller wants "to get the highest price for his property, and the pur- "chaser wishes to give the lowest, and in that sense it "may be said that an expected difference between the "parties is to be implied in every case." Can a real market ever exist, where one party must trade on market conditions alone, whilst the other has this same opportunity plus a power of appealing for the aid of the District Attorney? Is the rule hereafter to be that human characteristics and methods, universally existing and applied, are all to become the basis for a charge of crime, and that the law, in attempting to reach that equality and fairness which constitute justice, is going to allow those wishing to buy commodities produced by others to beat down the prices, whilst those who have added to the world's supply are to defend their rights in bargaining by a threatened intervention by the State that may end in their ruin as well as their loss of liberty?

But let us return to our sugar case and ascertain a part of the guesses that could not be answered if such a case were fairly tried. 1. Under existing conditions, what must be the amount of taxes to be deducted, National, State and Municipal? Would it be fifty per cent. and upward, as at present, or eighty, or ninety, or one hundred? 2. What is the exact percentage of plant idleness through failure of raw sugars and materials to arrive, by reason of never ceasing strikes, embargoes and like contingencies, and the impossibility at times of procuring necessary supplies of coal? Every one knows that the cost of production not only may, but does, go

[144] In Omaha vs. Omaha Water Co., 218 U. S. 180 (see page 195). 1910.

up by leaps and bounds, as output decreases. 3. What are the increases in cost price going to be? We know that labor has advanced from fifteen cents to fifty-five cents an hour. We know that coal has advanced from two and one-half dollars a ton to sixteen and one-half dollars, and raw sugars have mounted from $.0327½ to $.2462 per pound. One hundred per cent. advance in price for this commodity, therefore, is really very insignificant. We know that some sum must be allowed to stimulate improvement, inventive genius and production, if the present scarcity is not to continue. At what sum are enterprising business men to be permitted to fix that item, without inviting ruin and a loss of their freedom and consequent usefulness? 4. We know it is vital that, if these improvements in plant are stimulated, an enormous amount of property must be discarded and scrapped in order that the public may receive the benefit. As an instance of this constant occurrence by reason of an improvement in the filters used in refineries, sugar plants are scrapping a very expensive portion of their machinery. What sum are they to determine, in advance of unknowable inventions which should be applied for this purpose? 5. All men who have given any attention to economic thought know that *risk taking* in trade constitutes the chief difference between business men and wage workers. Without it, the world would never have reached its present necessary production. What is the proper sum to be allowed in any or all cases to provide for this most essential element? 6. And what sums are to be charged, not merely for the losses of the past, but for the losses of the future? We start with the advantage, in this respect, that hope so predominates over fear that this sum is rarely, if ever, estimated in sufficiently large amount. 7. What sums should be allowed for the losses

that are sure to arise in the times of such advances that have taken place, for the failure or refusal of the foreign producer of the necessary raw materials to make delivery to purchasers who, upon the faith of their contracts, have, in turn, sold against such contracts? 8. What sums should be reserved to cover penalties, fines, or the expenses and costs of litigation of those who may have honestly differed with the government's enforcing officers. It cannot easily be ascertained how enormous these unknowable items have already been even in cases where those charged with a violation of the Act have been exonerated by the Court, or acquitted by the jury. 9. What sum must be calculated to cover the enormous variation in the value of money that has taken place, and which has really turned all business into a most dangerous gamble? 10. And what sum, under all these conditions, is a man fairly to be allowed for the fact that from his profit he must buy his living from others whose commodities have likewise enormously increased, if not in value, at least in price? Are some to be denied the equal protection of the law in this respect, and others given it? That must in such case be the inevitable effect! If justice is to be done, all these questions, and many more like them, must be answered, even though it is beyond the power of the human intellect to do so. Of course, the difficulties enumerated are passed along the line. The manufacturer has to meet it; the wholesaler, in turn, is governed by what the manufacture has to guess at, before the retailer has his turn.

If this be called theory, let us turn to real facts, and reason that from what has happened we may form a fair conclusion as to what may happen. Let us continue with the sugar case, as that is the most discussed subject.

In the case recently decided of United States vs. United States Steel Corporation, is found an enunciation of a great truth:[145] "It has become an aphorism that "there is danger of deception in generalities, and in a "case of this importance we should have something "surer for judgment than speculation, something more "than a deduction equivocal of itself, even though the "facts it rest on or asserts were not contradicted. If "the phenomena of production and prices were as easily "resolved as the witness implied, much discussion and "much literature have been wasted, and some of the "problems that are now distracting the world would "have been given composing solution. Of course, com-"petition affects prices, but it is only one among other "influences, and does not more than they register itself "in definite and legible effect."

It is no doubt because of this truth that our law of Freedom, our law that lets *all of the people take part in finding natural values and fair and reasonable prices, has, in the end, always asserted its triumphant and necessary superiority.* If there be at last found a method by which business men can reduce all these uncertainties to that degree of proof necessary for criminal conviction, may it not be asked why Congress did not announce it, instead of imposing a task impossible of performance upon business men and the Courts?

It is fortunate that in dealing with the sugar cases arising under the Act we have an illustration of the wisdom of settled principles, where the history of the matter and its results have so largely become public property. Raw sugar has, within recent years, sold as low as $.0327½ per pound. Notwithstanding the War, Mr. Herbert Hoover, with the aid of the Refiners,

[145] In United States vs. United States Steel Cororation, 251 U. S. 417 (see page 448). 1920.

purchased it at five and one-half cents per pound, with the result that it became relatively the cheapest of all food commodities, and with the natural result that it advanced enormously in consumption. It is important to remember that everybody was left free to buy or not to buy, and that there was no interference with the liberty of trade. All that Mr. Hoover really did was, with rare good judgment, to foresee conditions and make a wonderfully advantageous purchase, and subsequently to fix his own selling terms, thereby giving the benefit of his endeavors to the people at large. He made no one sell to him or buy from him, but left each dealer free to accept his terms or do as he pleased otherwise. Prohibition laws and the increased consumption from the unnatural price established as compared with other commodities necessarily enormously increased the demand, indeed, to an extent that has not yet been measured because of the inadequacy of available supply. Matters were so successfully handled that the President of the United States thereafter received a further offer of another year's crop of raw sugar at the price of only six and one-half cents per pound. This price, however, was double that at which sugar had actually sold under normal conditions. Had he accepted it, this discussion, as far as sugar is concerned, would have been entirely unnecessary. But, though he had the advantage of all the resources of the National Government to guide him, he refused to purchase. Now, this is not stated by way of criticism, because the great majority of those expert in the trade were unwilling to purchase adequate supplies at a similar price. Moreover, since that time duty paid raw sugars actually have been purchased, and in far less quantities than was called for and desired, at upward of twenty-four and one-half cents a pound. This fig-

ure is between three and four hundred per cent. increase over the price which some of the ablest men in the business in this country felt was too high previously thereto, and, no doubt, honestly so felt. We see how easy it is for even the most expert men to fail in reaching a correct conclusion on these unascertainable and difficult questions. To say, therefore, that those men who in rare exceptions had guessed the market price of sugar correctly, or probably less than half correctly, as to the prices that they would be compelled to pay for the replacement of their stock, for no other reason than their sales at this inadequate price, had acted criminally, seems preposterous.

Of course, it may be a theoretical estimate, but there is a general conclusion among economists that only about one man in every ten succeeds who assumes these risks of business. The rest fail chiefly because of the constant variation and inevitable losses of those taking *the risk* in business not even averaging with the possible gain. This again demonstrates Adam Smith's contention that the ever present tendency is for hope unwisely to overbalance fear.

Business will not and cannot go on, or production continue, much less increase, if, when the occasional year of profit comes, it is to be made more dangerous and cruel than even the years of loss. It is probable that most, if not all, of the men now under indictment for sugar profiteering were only indicted because of a failure on the part of the Government to distinguish between *"price"* and *"value"*; and, when the cycle that constitutes business is completed and their stock replaced, they will find that they are much poorer instead of richer than if they had been guided by *"value"* instead of mere *"price."* They will wish that they had adhered to Adam Smith and all his fol-

lowers, instead of losing sight of the truth by an attempt to re-establish the impossible mercantile system.

And again it must be recalled that of the many considerations involved, the present value of our currency approximates only thirty-five per cent. of its former value. Therefore, a dealer, to obtain for himself an "exchangeable value" that will enable him "to replace his commodities" or obtain other commodities in equal quantity must, without regard to all the other complications and difficulties, receive above three hundred per cent. of his former prices. For the Act to punish him for doing so, is to penalize him for trying to safeguard against the ruin of his business.

Something should be said of the opinion of Judge Hazel in the Weed case,[146] for it may well be used as a basis for summarizing the conclusions already stated. Although he says: "Candor compels the admission that the objection of uncertainty is not altogether free from doubt," he, like the other Judges of the lower Courts, makes no examination at all as to the real meaning of the Act, or as to the serious Constitutional questions that are raised by interpreting it to mean that all the prior doctrines of our common and statute law are swept away by his assumed interpretation. He supports his decision that the Act is constitutional upon the basis of legal principles which abrogate the Constitution itself, and so far as commodities are concerned, upon principles which will establish Communism in this country. It is submitted that if his contentions be correct, Mr. Justice Brewer's classical opinion in the Monongahela Case,[147] so constantly followed and

[146] Weed & Co. vs. Lockwood, 264 Fed. 453. 1920.

[147] Monongahela Navigation Company vs. United States, 148 U. S. 312. 1893. Justice Brewer said (page 324): "The question

maintained heretofore, has ceased to have any purpose or effect, and that many other Supreme Court decisions are likewise overruled. And this is particularly true from Judge Hazel's conclusion that if any things can properly be defined as "necessaries," in which of course the public has an interest, "the Lever Act does "not deprive any one of his property without due pro- "cess of law, *it merely limiting the rate of charge for "dealing in or with any necessaries.*" "For the foregoing reasons," he says, " I am of the opinion that this "Court ought not to declare unconstitutional the pro- "vision to which exception is taken by the defendant."[148] In other words, the decision in the case, if it be correctly understood, would lead to the conclusion that the Judges have been continually in error, at least from the time of Lord Chief Justice Coke, who it will be remembered said,[149] *"for what is the land but the "profits thereof,"* to the case of Cleveland vs. Backus[150]

---

presented is not whether the United States has the power to condemn and appropriate this property of the Monongahela Company, for that is conceded, but how much it must pay as compensation therefor. Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; for in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government. The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehensions of many, that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights."

[148] Weed & Co. vs. Lockwood, 264 Fed. Rep. 453 (see page 456). 1920.

[149] Littleton, 4 b.

[150] The Cleveland, Cincinnati, Chicago & St. Paul Railway Company vs. Backus, 154 U. S. 439. 1894.

and down to Branson vs. Bush,[151] decided by the Supreme Court in November, 1919. Mr. Justice Clarke, in direct contradiction to such a conclusion, there says: "The *value* of property results from the use to which "it is put *and varies with the profitableness of that use,* "present and prospective, actual and anticipated. *There "is no pecuniary value outside of that which results "from such use.*"

The Fifth Amendment is really of no consequence, if all that is necessary to deprive citizens of their property is for a Court to determine that the public needs the property, and, therefore, has a right to impair or destroy that which alone constitutes its value. If this really be the law, the inspiring opinion of the Supreme Court in the Monongahela Case[152] has been overruled. The great necessity for a commodity naturally increases its value. But it is contended that that which creates value deprives it of the protection which the Constitution gives it. However, the Supreme Court, in the case just mentioned, said:[153] "Obviously, this question, as all "others which run along the line of the extent of the "protection the individual has under the Constitution "against the demands of the Government, is of impor- "tance, for in any society *the fullness* and sufficiency of "the securities which surround the individual in the "use and enjoyment of his property constitute one of "the most certain tests of the character and value of "the Government. * * * Illegitimate and unconsti- "tutional practices get their first footing * * * by "silent approaches and slight deviations from legal "modes of procedure. This can only be obviated by

---

[151] Branson vs. Bush, 251 U. S. 182. 1919.

[152] Monongahela Navigation Company vs. United States, 148 U. S. 312. 1893.

[153] Id., 148 U. S. (see page 324).

"adhering to the rule that constitutional provisions for "the security of person and property should be liber- "ally construed. A close and liberal construction de- "prives them of half their efficiency, and leads to grad- "ual depreciation of the right, as if it consisted more "in sound than in substance. It is the duty of Courts "to be watchful for the constitutional rights of the citi- "zen, and against any stealthy encroachments thereon. "Their moto should be *obsta principiis.*"

Certainly the Supreme Court was wrong in thinking that the danger to the Constitution was "in silent "approaches and slight deviations" and in "stealthy "encroachments," if all the purposes of the Constitution were to be swept away by a simple finding of the Judge that property was of sufficient value to be a public need. It can be believed that the worst and most despotic Government that ever existed did not take any property that was of no use. Even in the case of monopolistic enterprises, where some public check has been held to be necessary, no such doctrine has ever been applied as that the greater the value the smaller the right to Constitutional protection. It is certainly not construing the words "private property" "liberally" to hold that, although it is unqualified in the Constitution, it is to be read and confined to "private property of no use." But the Constitution cannot thus be frittered away, as the Courts have said so many times, and as early said in the Prigg Case,[154] and even in the Craig Case.[155]

It has already been shown what a disastrous effect such a ruling will have upon production. There are some other phases of this opinion which can-

[154] Prigg vs. Pennsylvania, 16 Peters 539 (see page 612). 1842.
[155] Craig vs. Missouri, 4 Peters 410. 1830.

not go without comment. Judge Hazel then continues:[156] "Presumably, Congress intentionally used "the words 'unjust or unreasonable rate or charge' "without qualification or the inclusion of a max- "imum price or standard to the end that there be "a determination by the jury * * * in view of "existing economic conditions." But he continues, properly: "In determining such question it is essen- "tial *to consider all the facts and circumstances, what- "ever they may be, relating to the exacted rate or "charge,"* having, however, frankly said further in the opinion that:[157] "Candor compels the admission that "the objection of uncertainty is not altogether free from doubt." It is, however, believed that had he examined the real economic principles involved, he must have concluded that there could be no doubt that the Act as he assumed its meaning was unconstitutional; that even because of his own grave doubts upon this question of Constitutionality, he would have interpreted the Act to be *in pari materia* to the Common Law and the Sherman Act. He would not have supposed that the class of monopolistic enterprises, because of the necessity of curbing monopolies, established a general rule. On the contrary, he should have seen that because they could not properly be curbed by the better rule of freedom in trade, where prices would be fixed in free competition, the cases of monopolies constituted an exception to the general rule. As he himself points out:[158] "It is essential to consider all the facts and circumstances" in matters where the most essential perhaps are inevitably still contained in the womb of the future.

---

[156] Weed vs. Lockwood, 264 Fed. Rep. 453 (see page 456). 1920.
[157] Id., page 457.
[158] Weed vs. Lockwood, 264 Fed. Rep. 453 (see page 456). 1920.

As has been pointed out, no one can tell what taxes may be levied; no one can tell what the risks of business may be; no one can tell what the replacement cost may total; every one that enters business has to guess at these and a thousand other factors—and nine men out of ten in the long run guess at them incorrectly,—to their ruin.

Of course, the learned Judge would be right had the Weed case fallen within the principle of the Nash Case;[159] but the Supreme Court has, again and again, so plainly marked the distinction between it and the Harvester,[160] Collins[161] and Pennsylvania Railroad[162] Cases, which have been discussed, that it is perplexing to understand why there should be any conflict or difficulty in arriving at the one correct result. To repeat, again, where all the facts and circumstances are known, ordinarily intelligent men can reasonably and lawfully make deductions from them. With a preponderance of evidence, men can find only from their common experience whether they have exercised the care of reasonable men, or whethey they have complied with certain duties, even where they have intended the natural consequences of their acts. But the cases where these fundamental rules of conduct have been laid down deal generally with Common Law wrongs. When, however, it comes to dealing with property and exercising the property rights appertaining to freemen, there has been built up and safeguarded an absolutely different system. It has become fundamental that men should compete with each other with an absolute and untrammeled freedom of discretion, and it is not only the best sys-

[159] Nash vs. United States, 229 U. S. 373. 1913.
[160] Harvester Co. vs. Kentucky, 234 U. S. 216. 1914.
[161] Collins vs. Kentucky, 234 U. S. 634. 1914.
[162] U. S. vs. Pennsylvania R. R., 242 U. S. 208. 1916.

tem, but the only system that is practicable in a free country.

Reviewing the authorities to which Judge Hazel refers in his opinion, it may be noted that the cases he cites are plainly and clearly within the Nash Case[163] and as plainly and clearly distinguishable from and unlike the Collins [164] or Harvester Cases,[165] and do not in any way touch the present matter. The Fox Case,[166] to which he refers, could not have been decided otherwise than it was. Mr. Justice Holmes there repeats what has been contended for that "so far as statutes "fairly may be construed in such a way as to avoid "doubtful constitutional questions, they should be so construed"—a rule of law that has been disregarded in all the cases under the Lever Act—and shows that the offense there was plainly wrongful because it was an encouragement to a positive breach of law.[167] The Miller Case,[168] cited by Judge Hazel, was one of gross and perhaps criminal negligence, and the Supreme Court properly says in its opinion: "The case falls, therefore, under the rule of Nash vs. United States, and not "under the rule of International Harvester Co. vs. "Missouri"—recognizing the distinction which none of

[163] Nash vs. United States, 229 U. S. 373, 111.
[164] Collins vs. Kentucky, 234 U. S. 634. 1914.
[165] Harvester Co. vs. Kentucky, 234 U. S. 216. 1914.
[166] Fox vs. State of Washington, 236 U. S. 273. 1915.
[167] In Fox vs. Washington, supra, a statute made criminal the editing of printed matter tending to encourage or advocate disrespect of law. The defendant edited an article that tended to encourage the breach of the State laws against indecent exposure. The defendant contended that the statute was an unjustifiable restriction of liberty and too indefinite for a criminal statute. The statute was held constitutional and the conviction affirmed.
[168] Miller vs. Strahl, 239 U. S. 426. 1915. The case concerned a police statute, in which keepers of hotels were required to give notice to guests in case of fire. It was held that the statute was not void for uncertainty in not prescribing rules of conduct in other than general terms.

these learned Judges in the lower Courts have referred to or recognized.

And finally in the Omaechevarri case,[169] to which Judge Hazel refers upon the point that rules of conduct must necessarily be expressed in general terms and depend upon varying circumstances, it was clearly pointed out that in a criminal statute general provisions are not necessarily in violation of constitutional rights where common experience in the subject matter renders such terms definite. The Court said in this case, construing an Act regulating sheep rangers: "Men "familiar with range conditions and desirous of ob- "serving the law will have little difficulty in determin- "ing what is prohibited by it." This decision, therefore, is directly contrary to that arrived at by Judge Hazel in the Weed case.[170]

Consequently a close analysis of the Weed Case forces the conclusion that the broad, underlying principles of constitutional rights and of economic necessities have been almost completely disregarded in the course of reasoning which brought the Court to its decision. Furthermore, that the Circuit Court of Appeals, although it turned aside from the contentions and authorities given so much weight in the Court below, and based its affirmance principally upon the exigencies of a great conflict ended, nevertheless failed to realize that the remedy, for the ills of which the Act was intended to

---

[169] Secundino Omaechevarria vs. Idaho, 246 U. S. 343. 1918. A statute of Idaho, in order to avert clashes between sheep herdsmen and cattle rangers, prohibited any person having charge of sheep from allowing them to graze on a range usually occupied by cattle. The object of the statute was to prevent the encroachment of sheep upon cattle ranges, resulting in driving out the cattle and impairing the industry. It was contended that the act was indefinite in its terms. The court held that the act was to be interpreted in the light of the common experience and knowledge of those familiar with the subject matter of the statute.

[170] Weed & Co. vs. Lockwood, U. S. Atty., 264 Fed. 453. 1920.

be curative, lay in a reaffirmance of the principles of free competition in trade, by which only, through forces naturally operating, prices of commodities could be maintained at a level fair, just and non-excessive.

There are no men so gifted with wisdom and prescience who can tell what future replacements will cost, what future taxes are to be or when levied, what strikes, what transportation difficulties, what idleness, what storms, what droughts, what earthquakes, what fires, what wars, what revolutions, what crop failures, and really what everything else is going to be.

As has been pointed out, the general tendency is to underestimate these things, just as the President of the United States underestimated them in the case of sugar.

The sugar refining industry affords a striking illustration of the uncertainties for which due allowance should be made in determining prices. A Refiner, having in mind the possible results of these uncertainties, inquired of the greatest Insurance Agency in the world what would be the rate of insurance against a decline from the high prices of its supplies of raw sugars, owned or under contract.

The correspondence is so interesting and instructive that it may prove of real value to those engaged in the effort to solve the same problems. The following are fac-similes of the letters, but with the name of the Refiner omitted:

Philadelphia, May 1, 1920.

INSURANCE ON RAW SUGAR AGAINST DEPRECIATION IN MARKET VALUE.

Referring to your recent inquiry for insurance to pay any loss which you might sustain during the policy period by reason of a fall in market value on raw sugar, held or contracted for by you, no loss to be payable unless such

market value fell below 15c. a pound, we regret to advise you that we have been unsuccessful in finding any market for an insurance of this character.

We have made a thorough canvass of the Insurance market, and, through our London correspondents, have thoroughly tried the market at London Lloyd's, but have not obtained a single offer to write such a policy at any rate.

We regret our inability to assist you in obtaining this protection, but it is our opinion that losses of this character are uninsurable losses at any obtainable premium.

Yours faithfully,

MATHER & Co.

May 29, 1920.

Mather & Co.,
226 Walnut Street,
Phila., Pa.

Gentlemen:—

After the trouble that you took in communicating with Lloyd's, I dislike troubling you again, but, can you accomplish my purpose, you will render me a great service.

In estimating the cost of our production, we have, among other things, to include risk, and would very much like to insure this item. Raw sugars usually sell at about one-fourth of the present market price. We are compelled to buy large quantities, and, on the average, considerably ahead of the dates of delivery, and are under the constant necessity of replacing the sugars manufactured by us. If we have to estimate these items, we are largely guessing on a very uncertain and highly speculative market. Under these circumstances, it would be a relief to us and prevent misunderstandings between ourselves and the Government, if we could cover this risk for the periods likely to be involved.

Don't you think if you made a serious effort, and were able to pay say three cents a pound on a 20c. market, that Lloyd's or some one else in like enterprises, might be willing to assume the risk for us, and, could it be arranged, I feel great confidence that our Board would not only approve, but highly appreciate your service.

Yours truly, etc.

May 29, 1920.

We beg to acknowledge receipt of your letter of May 29th with reference to insurance to protect you against loss by reason of a fall in the market value of sugar held by you, and it is needless to say that it would be a great source of satisfaction to us if we could obtain this protection for you.

In response to your inquiry for insurance of this character in April we placed this matter before our London correspondents, who endeavored to develop a matter for this insurance with London Lloyd's, whom we know to be the only possible source from which insurance of this character might be obtained, but our correspondents were unable to secure any quotations at any rates whatever.

In our opinion the risk which Underwriters would take upon themselves in issuing such a policy would be so great that is could not be undertaken at even double the rate of three cents a pound mentioned in your letter. Indeed, considering the present abnormal price of sugar we do not believe that Underwriters would be warranted in writing this insurance at any obtainable premium.

We greatly regret our inability to be of assistance to you in this instance, but to the best of our knowledge and belief it is quite impossible to obtain the insurance which you desire.

Yours faithfully,
MATHER & CO.,
Per JOSEPH A. O'BRIEN.

Of course, the Refiner would be entitled to a fair insurance risk in his calculations, whether he covered it with an insurance company or assumed it himself; and as this can easily be ascertained to amount not only to more than the whole general profit, but to more than insurance, production cost and profit put together, it can easily be seen how correct Adam Smith and other economic thinkers are in stating that it is nearly al-

ways underestimated. The explanation of this is, again, *free competition.* In order to keep their trade, men have a tendency to underrate possible loss, and to take chances in business with reference to the elements which are uncertain and undeterminable. Thus we have the high percentage of failures in business enterprises, where the preponderating element and distinction necessarily consist of risk taking.

If the Act is to be thus interpreted, Judges will have an impossible task in their instructions to juries in the cases tried before them. They will have to say, in effect:

> "Gentlemen, this is a criminal proceeding; you cannot guess men out of their Liberty; you must have evidence that satisfies you, *beyond any reasonable doubt,* that the defendant, in dealing with matters looking largely to the future, and about which no one can be guided except by surmise or guess, didn't guess at all, but correctly drew deductions from the known facts and circumstances, which could not be known at the time he acted. You must be guided by the knowledge and experience of the ordinary reasonable business man in determining that the defendant, beyond every reasonable doubt, drew improper deductions from known facts in fixing the prices of the necessaries in which he deals. You must be careful, however, to remember that it was impossible for him to know all these essential facts, and that the common deductions of the ordinary man upon such matters are, to an excessive degree, entirely wrong. You are also to remember that as one section of the Act, itself, provides, in supplying the President of the United States with funds for business purposes, that such funds are recognized as *'revolving'* items. That is to say, that business proceeds in a cycle, and, so long as it continues, is never completed, nor its profits really ascertainable. That in such matters the real result is never

> really ascertainable until the final cycle is completed. But you are to ignore all this, and stop it anywhere you please, although you know that business varies, and that the profits of inflated years are, as a rule, more than lost in the succeeding years of deflation and depression. You must guess and you must not guess. You can reach a verdict in this case only by guessing, but you must not guess as to the facts, or consider other than the positive evidence (if there is any that has been offered) of the case."

The foregoing, for the purpose of emphasizing the difficulties arising under an erroneous interpretation of the Act, may have gone somewhat to the extreme of illustration, but it is entirely consonant with the true and existing conditions which a dealer faces every day in determining the prices of the "necessaries" which he offers for sale, all of which considerations should be given full weight by a jury, or other tribunal attempting to pass upon the issue whether such prices charged were, in fact, unfair, unreasonable and excessive.

No one who thinks the matter out can have any doubt as to what would be the final conclusion as to such an inquisitorial attempt. It will be exactly the result that has ever been reached after such attempt and throughout the centuries. Although to the present time there have been various conflicting decisions under the Act, there has been none in which the Court has not shown marked evidences of embarrassment and reluctance.

The final consideration of the Court in the Weed Case suggests a matter that seems to have been overlooked. It is of most vital importance, and involves the question whether it was not necessary for the Government, through the President, to "fix the

"prices of * * * necessaries." The opinion thus refers to this subject: "His failure to do so, perhaps, "because of its *recognized futility,* does not render the "indictment invalid." If the President could not determine prices of necessaries safely and effectively, as was shown in the case of sugar, then far less should it fairly be required of his fellow citizen to make such decision under peril of indictment. This phase of the matter is, however, not now under consideration, but a more serious one. A citizen, having used his best judgment as to prices which he fixed, and having reached a conclusion conscientiously and without any complaint or threat from the Government, has, in turn, no right to complain. He has no right to redress where no wrong is threatened. But he has a constitutional right, where his property or its fruits are to be taken from him, freely to submit his contentions to a court of justice and have the matter judicially determined, both for his redress and guidance. That right has been for centuries the chief aim of civilization. An Act that discourages such procedure is both against civilization and the Constitution. Even a sovereign state cannot check the right that now *"freely exists"* to have proper Constitutional questions involving rights of citizens determined by the Supreme Court, as was decided in the Harrison Case[171] and in the Wadley Case.[172]

It, of course, follows under the latter case and those cases which are approved and relied upon therein, that defendants, before they can be either fined or imprisoned, are entitled to their day in Court, and the determination by some judicial tribunal of what is a fair

---

[171] Harrison vs. St. Louis & San Francisco Railroad Company, 232 U. S. 318. 1914.

[172] Wadley Southern Railway Company vs. Georgia, 235 U. S. 651. 1915.

and reasonable price. It also appears that by reason of the varying factors determining commodity cases, no adjudication could establish a precedent, and a constant recurrence of decisions would be necessary from day to day. The cases would become so numerous that it would be impossible to enforce the penalties of the Act, which would become as futile as if it were entirely without penalty.

CHAPTER VII.

Our Paramount Interest.

The Supreme Court has long since declared that Liberty is the greatest of all rights, and it has become so firmly established that in relation to *property* rights it constitutes the cornerstone of all constitutional protection.

The questions constantly asked: "Why Anglo-"Saxon civilization has flourished so much longer than "many of its predecessors, and whether it may be "hoped that it will avoid the deadly fossilization or "death of so many of its predecessors," may find their complete answer in maintaining the safeguards established for the preservation of individual rights under its forms of government. The determination of these present questions by the Supreme Court involves the greater issue whether the tendencies to decay are to be further averted or to be given full swing, with all their deadening effects.

Liberty, and Liberty alone, is the safeguard—the Liberty preserved through all these centuries. Well did the House of Lords say in the Nordenfelt Case:[173] "*The public have an interest* in every person carrying on "his trade *freely;* so has the individual. *All* interfer-"ence with *individual liberty of action,* in trading, and "*all* restraints of trade of themselves, if there is nothing "more, are contrary to public policy." As widely as Chief Justice Fuller and Mr. Justice Harlan differed,

[173] Nordenfelt vs. Maxim, 1894 A. C. 559. 1894.

they both concurred that it was unlawful *"to deprive "the public of the advantages which flow from free "competition."* And well did the Supreme Court say in Loewe vs. Lawlor:[174] "At common law, every per- "son has individually, and the public also has collect- "ively, a right to require that the course of trade should "*be kept free* from unreasonable obstruction."

If it be asked why the Courts, for upward of five centuries, have been so continuously and constantly insisting upon the preservation of this Liberty, the answer must go deeper, but is no less clear.

Until what the English and American jurists had worked out instinctively was analyzed by philosophers, there was no satisfactory answer to the oft made inquiry: Why so many nations, having attained a high civilization from which a greater advance was to be expected, suddenly became stationary, or fell into decadence? Why was it that hordes of *free* barbarians had so frequently, and apparently with such ease, overthrown much better organized and higher forms of civilization? These questions were never satisfactorily answered until the physiological truth was realized that as you cannot have complete health and continuing growth without freedom, so you cannot have moral, political and economic development without Liberty. Put mind, body, trade or government in too tight bonds and deterioration, if not death, is the inevitable consequence.

But, in civilization, this tendency always exists, because of the profound effects of Liberty and co-operation. Liberty makes *men;* co-operation makes *enlargement of wealth.* As the spider ultimately devours her

---

[174] Loewe vs. Lawlor, 208 U. S. 274. 1908.

mate after he has aided her in enlarging her progeny, so co-operation tends to make property the chief end of society instead of Liberty and equality. Where wealth accumulates, there is ever the tendency for men to decay; and so, as Thomas Jefferson has pointed out: *"The natural order of things is for Lib-"erty to yield and for Government to gain ground."* And as the enforcement of order and the protection of ever accumulating wealth becomes the Government's chief end, Liberty is ever more and more forgotten or restricted. Man, placed in second place, less regarded, and more hampered in his free and independent development, loses character, strength, and ceases to exist as a power or force. All these price fixing regulations are putting him under the tutelage and protection of a host of Governmental servants employed and paid by him, with no other possible result than his complete enervation and inability to protect himself. He follows the course of the faineant Kings of France and, like them, perishes when he comes in conflict with men who have remained free.

It has been splendidly written:

"Here is the law of progress, which will explain "all diversities, all advances, all halts, and retrogres-"sions. Men tend to progress just as they come closer "together, and by co-operation with each other increase "the mental power that may be devoted to improve-"ment, but just as conflict is provoked, or association "develops inequality of condition and power, this ten-"dency to progression is lessened, checked, and finally "reversed. * * * In a general way, these obstacles "to improvement may, in relation to the society itself, "be classed as external and internal—the first oper-"ating with greater force in the earlier stages of civili-"zation, the latter becoming more important in the

"later stages. * * * I mean, so to speak, *that the*
"*garment of laws, customs, and political institutions,*
"*which each society weaves for itself, is constantly*
"*tending to become too tight as society develops.* * * *
"*Modern civilization owes its superiority to the growth*
"*of equality with the growth of association.* * * *
"*Civilization is co-operation. Union and liberty are*
"*its factors.* The great extension of association—
"not alone in the growth of larger and denser
"communities, but in the increase of commerce and
"the manifold exchanges which knit each community
"together and link them with other though widely sep-
"arate communities. * * * the advances in security
"of property and of person, in individual liberty, and
"towards democratic government—advances, in short,
"*towards the recognition of the equal rights to life,*
"*liberty, and the pursuit of happiness—it is these that*
"*make our modern civilization so much greater, so*
"*much higher, than any that has gone before.* It is
"these that have * * * increased productive power
"by a thousand great inventions. * * * *From first to*
"*last, slavery, like every other denial of the natural*
"*equality of men, has hampered and prevented prog-*
"*ress. Just in proportion as slavery plays an important*
"*part in the social organization does improvement*
"*cease.* That in the classical world slavery was so uni-
"versal, is undoubtedly the reason why the mental ac-
"tivity * * * never hit on any of the great
"discoveries and inventions which distinguish mod-
"ern civilization. No slave holding people ever
"were an inventive people. * * * *To freedom*
"*alone is given the spell of power which summons the*
"*genii in whose keeping are the treasures of earth and*
"*the viewless forces of the air.* * * * To turn
"a republican government into a despotism the basest

"and most brutal, it is not necessary formally to change "the Constitution or abandon popular elections. It "was centuries after Caesar before the absolute master "of the Roman world pretended to rule other than by "authority of a Senate that trembled before him. * * * "We honor Liberty in name and in form. We set up her "statues and sound her praises. *But we have not fully "trusted her. And with our growth so grow her de- "mands. She will have no half service!* Liberty! It "is a word to conjure with. We speak of liberty as one "thing, and of virtue, wealth, knowledge, invention, "national strength and national independence, as other "things. *But, of all these, Liberty is the source, the "mother, the necessary condition.* She is to virtue what "light is to color, *to wealth what sunshine is to grain;* "to knowledge what eyes are to sight. She is the genius "of invention, the brawn of national strength, the "spirit of national independence. Where Liberty "rises, there virtue grows, wealth increases, knowledge "expands, invention multiplies human powers, and in "strength and spirit the freer nation rises among her "neighbors as Saul amid his brethren—taller and "fairer. Where Liberty sinks, there virtue fades, "wealth diminishes, knowledge is forgotten, invention "ceases, and empires once mighty in arms and arts be- "come a helpless prey to *freer* barbarians. Only in "broken gleams and partial light has the sun of Lib- "erty yet beamed among men, but all progress hath "she called forth. Liberty came to a race of slaves "crouching under Egyptian whips, and led them forth "from the House of Bondage. She hardened them in "the desert and made of them a race of conquerors. "* * * Liberty dawned on the Phœnician coast, and "ships passed the Pillars of Hercules to plow the un- "known sea. She shed a partial light on Greece, and mar-

"ble grew to shapes of ideal beauty, words became the "instruments of subtlest thought, and against the scanty "militia of free cities the countless hosts of the Great "King broke like surges against a rock. She cast her "beams on the four-acre farms of Italian husbandmen, "and, born of her strength, a power came forth that "conquered the world. They glinted from the shields "of German warriors, and Augustus wept his legions. "Out of the night that followed her eclipse, her slant- "ing rays fell again on free cities, and a lost learning "revived, modern civilization began, a new world was "unveiled; and as Liberty grew, so grew art, wealth, "power, knowledge, and refinement. In the history of "every nation we may read the same truth. It was "the strength born of Magna Charta that won Crecy "and Agincourt. It was the revival of Liberty from "the despotism of the Tudors that glorified the Eliza- "bethan Age. It was the spirit that brought a crowned "tyrant to the block, that planted here the seed of a "mighty tree. * * * We must follow her further; we "must trust her fully. Either we must wholly accept her "or she will not stay. It is not enough that men should "vote; it is not enough that they should be theoreti- "cally equal before the law. *They must have Liberty "to avail themselves of the opportunities and means "of life;* they must stand on equal terms with refer- "ence to the bounty of nature. Either this, or Liberty "withdraws her light! Either this, or darkness comes "on, and the very forces that progress has evolved "turn to powers that work destruction. This is the uni- "versal law. This is the lesson of the centuries. * * * "But if, while there is yet time, we turn to Justice "and obey her, if we *trust Liberty and follow her,* the "dangers that now threaten must disappear, the forces "that now menace will turn to agencies of elevation." [175]

[175] Henry George, "Progress and Poverty," Book X, Chap. V.

At this moment the most stable Government in the world is our own, and it is solely because, in its real essence, it is the most free, in the only sense in which Freedom really exists; where men can act at their own free discretion, restrained only by the necessities of Justice. If the spirit of the Constitution is to be observed, that great instrument is always self-preserving. It needs only to be followed to be safeguarded. To the present time, the great fundamental principles which it buttresses have never been departed from. The wealth producing doctrines of free competition and an unhampered play of the law of supply and demand (as stated in the Patten Case [176]) have ever been adequately protected by the Supreme Court of the United States. That great tribunal, however difficult its task, has on the one hand defended men from the pernicious taxing power of monopoly, whilst, on the other, it has as certainly defended our citizens in their rights both freely "to pursue happiness," through all that is necessary to preserve untrammeled competition in commodities, and, freedom from threat or danger of persecution. It has always shown a consciousness that excess profits are, of necessity, the result of excess needs, *but their only permanent cure.* Whilst Governmental necessity has unfortunately resulted in such profits being, in greater part, diverted to Governmental needs, and thus inevitably delaying the cure, it is mere folly to imagine that a complete prevention of this only effective restorative to business could be other than disastrous in the extreme. It must result in the development of all essential industries by our foreign competitors and by the destruction of our own productive enterprises unless the Government

[176] United States vs. Patten, 226 U. S. 525 (see page 542). 1913.

soon relinquishes or lessens its exactions. At the present moment we see all other Governments engaged in fostering the development of their competitive power, with the single exception of Russia; so that there has been no time in history when it could be more dangerous further to harass and penalize those of our citizens engaged in industry. We have already, particularly in the Public Service utilities, too many dangerous and disturbing factors. Unnecessarily to extend such dangers to the whole trade of the United States, and to enforce regulations difficult of application to the merchandising of commodities, under conditions that can never receive adequate judicial consideration, or be workable upon a business basis, must, inevitably, bring on financial depression with all its consequent ills. These causes have often proved the death of Liberty, not only in trade, but in the broader meaning.

CHAPTER VIII.

General Conclusions.

"All who joy would win
Must share it.
Happiness was born a twin."

—Byron.

If the purpose sought has been accomplished, and it is understood that free and untrammeled competition is a necessary foundation both of Liberty and plenty; that market price is but the price varying from moment to moment which results from unrestricted freedom, and without which real competition is an impossibility; that those things which men use have real value, and not the mere counters which carry on the exchange of commodity for commodity called "trade"; that men should not, as is customary, thank others when they give things of real value in exchange for the mere facility of trading called "money"; that Courts have fallen into error in deciding that an essentially wrongful act has been committed when grown men, in a bargain freely made and to their mutual satisfaction, have given a moderate amount of goods for a large number of depreciated counters; that no one ever feels any distress when the reverse takes place and a larger amount of real things is exchanged for a smaller amount of such counters;—when these foregoing fundamental principles are fully taken into account, then only can clearly be comprehended the results of a violation of these essential truths.

It has been said that men expect results, but receive consequences, and perennial consequences have always come, true to principle, where these eternal laws are violated by men. The guardianship of adults by the State destroys manhood and the Liberty that manhood always craves. The mother of risk is uncertainty, and, no matter what the effort to ignore it, risk must be paid for—and it is the most expensive thing in business. To make the penalty of a mistaken opinion, as to anything, possible destruction, is the worst form of tyranny; and to threaten men in trade with discredit, ruin, and even imprisonment, for guessing wrongly the inscrutable risks of production as a means of terminating scarcity, is no more effective than to attempt to stop a conflagration by deluging it with a combustible. But the worst evil of all is that nothing so jeopardizes Liberty as economic distress. Those who have sufficient influence to lead the world into these errors, as Mr. Mill has pointed out, are always ready enough to shift the burden of their errors upon those who have chiefly suffered by them, and thus to urge an establishment of that terror which is always the ultimate result of such a propaganda. Envy, though the meanest basis of human conduct, is always the most certainly and promptly punished of any of our faults, even punished not merely by a loss of prosperity, but the greatest punishment—the loss of Liberty also. But as our poet has so well said: "Happiness was born a twin." We must all rise or fall together, where freedom and free competition are preserved; and though men have persecuted those who preached the duty of brotherly love with its accompanying well wishing, they have always paid for such deeds in sackcloth and ashes.

ADDENDA.

CHAPTER IX.

The Aftermath.

"They who are intrusted to judge ought to be free from "vexation that they may determine without fear. "The law requires courage in a Judge *and, there- "fore, provides security for the support of that "courage."*

—Chief Justice North—afterwards Lord Chancellor—in Barnardiston vs. Soame (1674), 6 How. St. Tr. 1096.

And now that we have the inevitable aftermath; now that business men, farmers, all are seeking aid from the Government because of ruinously *low prices;* now that we see panic in Japan, moratoriums in Boston, Cuba asking and even getting countenance from our Government, that there may be resources to carry it through; business men on all sides seeking and getting extensions; men by the thousands losing their occupations, it is being asked: "How was it possible to predict accurately the inevitability of all this, in the foregoing pages, written at a time when everything was at the highest, and the public convinced that it was there to stay forever?"

It is regrettable, however, that credit cannot be accepted. The task was no more difficult than predicting that the sun will rise to-morrow. Even an elementary inquiry as to economic law at once establishes that all

such matters are regulated by the unvarying perpetual law which, like all of the laws of Perfect Wisdom, have and always will produce like results from like causes.

It should never be forgotten that, as has been well said: "Natural justice is the conformity of human "laws and actions to natural order, and this collection "of physical and moral laws existed before any posi- "tive institutions among men. And while their ob- "servance produces the highest degree of prosperity "and well-being among men, the non-observance or "transgression of them is the cause of the extensive "physical evils which afflict mankind. If such a nat- "ural law exists, our intelligence is capable of under- "standing it; for, if not, it would be useless, and the "sagacity of the Creator would be at fault. As, there- "fore, these laws are instituted by the Supreme Being, "all men and all states ought to be governed by them. "They are immutable and irrefragible, and the best "possible laws: therefore necessarily the basis of the "most perfect government, and the fundamental rule "of all positive laws, *which are only for the purpose of "upholding natural order, evidently the most advanta- "geous for the human race.* * * * How could man "understand the necessity of labor to obey the irresist- "ible instinct of his preservation and well-being, *with- "out conceiving at the same time that the instrument of "labor, the physical and intellectual qualities with "which he is endowed by nature, belongs to him ex- "clusively, without perceiving that he is master and "the absolute proprietor of his person, that he is born "and should remain free?*

"*But the idea of Liberty cannot spring up in the "mind without associating with it that of property, in "the absence of which the first would only represent an "illusory right, without an object.* The freedom the

"individual has of acquiring useful things by labor "supposes necessarily *that of preserving them, of en-* "*joying them, and of disposing of them without* "*reserve.* * * * *Thus Liberty conceived in this* "*manner becomes property.* * * * The Physio- "crats, then, placed *absolute freedom, or property*—as "the fundamental right of man—freedom of Person, "*freedom of Opinion, and freedom of Contract, or Ex-* "*change;* and the violation of these as contrary to the "law of Providence, and therefore the cause of all evil "to man." [177]

Another great writer says: "Natural laws which "political economy *discovers,* whether we call them "laws of production or laws of distribution, have the "same proof, the same sanction and the same constancy "as the physical laws. Human laws change, but the "natural laws remain, the same yesterday, to-day and "to-morrow, world without end. * * * And so it "has been with attempts of human law *to fix and regu-* "*late prices,* which involve the same great laws of dis- "tribution in combined forms. Human law is always "potent to do as mankind will with what has been pro- "duced but it cannot directly affect distribution. That "it can reach only through production. * * * If "we look over the legislation by which the ruling por- "tion of our communities have striven to affect the "distribution of wealth, we shall find that (as if con- "scious of its hopelessness) they have seldom if ever "tried directly to affect the distribution of wealth; *but* "*have tried to affect distribution indirectly through* "*production.*"

It is to be remembered that Mr. Mill was ulti- mately driven to the same conclusion, and, accordingly,

[177] Henry Dunning MacLeod, "Elements of Economics," Book I, Chap. V, Sec. 3.

Governor Coolidge was but announcing a long realized fundamental truth when he advised the Legislature of Massachusetts that its function was to *"discover"* laws. But, whilst human laws cannot repeal economic laws, they are constantly subject to reversal by them—often after infinite harm has been done.

If our suffering from such errors is less than that of other people, it is doubtless because the Supreme Court has always had the power and will to interpose the shield of the Constitution between the ephemeral follies prompted by temporary difficulties, and remedies that endanger freedom. It follows that the preservation of these *"discovered"* laws is really the great constitutional service of that greatest of Courts. It is hoped, therefore, that a further brief discussion of a few of the fundamental *"discovered"* and, therefore, constitutional laws, applying to the Lever Act, and founded on natural justice, may be pardoned.

For example, one for which we have both Divine and human authority is that as "no man can serve two masters," and, therefore, be a proper judge in his own case, an Act must be fundamentally wrong and unconstitutional, that, in real substance, first constitutes him the judge in the fixing of the prices of his property; and then appoints the judges to try him, jurors who are also acting as judges in their own cases with diametrically conflicting interests. Lord Chief Justice Hobart, in Day vs. Savage,[178] long since, though not buttressed by our Constitution, gave as an illustration for acts of Parliament void for violation of "natural equity," those *making men judges in their own cases,* saying: "Even an act of Parliament made "against natural equity, *as to make a man a judge in his*

[178] Day vs. Savage, Hob. 85-87.

"*own case*, is void in itself, for *jura naturae sunt immo-* "*bilia, and leges legum.*" And LORD BLACKBURN, speaking for all the attending Judges, again says: "It is "contrary to the general rule of law, not only in this "country, *but in every other,* to make a man a judge in "his own case."

Perhaps the most important of these "*discovered*" laws is that those appointed, or forced by law to exercise judgment, or a use of discretion, must be protected from the consequences of the risks of the errors necessarily involved.

This law was naturally among the earliest to be "*discovered,*" and its violation as naturally and reasonably involves the greatest degree of resentment and distress. It is in the writer's opinion the most important in the whole discussion. It, therefore, becomes of prime importance clearly to ascertain its reason, because, as Lord Coke, so long ago and so well said:[179] "The law is unknown to him that knoweth not the rea- "son thereof, and that the known certainty of the law "is the safety of all"; and also because the law consists "not in particular instances and precedents, but in the "reason of the law."[180]

From the earliest time, and in all civilized nations, the higher Judiciary have always given themselves complete immunity from their errors in judging. Constantly having to use judgment, they inevitably at once ascertained the impossibility of satisfactorily performing this higher function in an atmosphere of constant annoyance, anxiety and fear; and it was for the public benefit—not from timidity or favor to themselves—that they declared this never departed-from exemption. But since "reason is the life of the law," and its prin-

[179] I Inst. Epil.

[180] Lord Chief Justice Holt, Ashby vs. White, 2 Ld. Reym.

ciples must necessarily be applied under the maxim: "*Ubi eadem Ratio ibi idem Jus,*" [181] the principle has been steadily, and from necessity of justice, wider and wider applied. "Like reason making like law."

It is not necessary to examine a multitude of cases, as the Supreme Court itself has thoroughly established this proposition in more than one decision unanimously arrived at. Reference to one of them, Spalding vs. Vilas,[182] must be sufficient to conclude this question. In that case the Postmaster General, not a Judge at all, reached and expressed an opinion in the course of his duty. He was under no necessity of such expression, but he did act in the performance of a dutty entrusted to him. Alleged damage followed, and suit was brought against him. The Supreme Court, after examining the general cases applying to the Judiciary, inevitably reached the unanimous conclusion that for like reasons he must also be immune from suit, saying: "The allegation of "malicious or corrupt motives could always be made, "and if the motives could be inquired into Judges "would be subjected to the same vexatious litigation "upon such allegations, whether the motives had or had "not any real existence. * * * The doctrine "* * * has a deep root in the common law. It is to "be found in the earliest judicial records, and it has "been steadily maintained by an undisputed current "of decisions. * * * It is essential in all Courts "that the Judges who are appointed to administer the "law should be permitted to administer it under the "protection of the law, *independently and freely, with-*"*out favor and without fear.* * * * How could a "Judge so exercise his office if he were in daily and "hourly fear of an action being brought against him,

[181] Coke upon Littleton, 10 a.

[182] Spalding vs. Vilas, 161 U. S. 483. 1896.

"and having the question submitted to a jury * * *?
"*Does an action lie against a man for maliciously doing*
"*his duty?* I am of opinion that it does not * * *
"No Judge, no jury, no witness * * * could dis-
"charge his duty freely if not protected by a positive
"rule of law from being harassed by actions * * *
"and * * * that the position of the defendant
"manifestly required a like protection to be extended
"to him and to all other officers in the same position."
"There is," MELLOR, J., said, "little doubt that *the*
"*reasons which justify the immunity in the one case*
"*do in great measure extend to the other.*"

Nowhere has this been better stated than by Lord Chancellor NORTH, centuries ago, in Barnardiston vs. Soame:[183] "They who are intrusted to judge *ought to*
"*be free from vexation that they may determine with-*
"*out fear.*"

As the Courts decide upon the real substance of things, let us inquire what this Act requires.

It has, again and again, been determined that the fixing of charges, etc., is a purely legislative function, to be exercised by the Legislature or its properly denominated substitutes. It, of course, follows, from the decisions already referred to, that both are immune from action or indictment. The Lever Act, departing from established custom, appoints each seller of certain commodities the price determining authority. His judgment, whatever it may be, must control the primary act. But he, unlike the others, has no volition whatever, for he must decide under penalty of losing not only his means of livelihood, but even his constitutional inalienable "right of pursuit."

But this is not all by any means. As the Supreme Court has itself pointed out, this legislative function

[183] Barnardiston vs. Soame (1674), 6 How. St. Tr. 1096.

forced upon him is perhaps the most difficult in all the law, most liable to error, most requiring of aid from every source. In the Knoxville case,[184] it is expressly termed "*a delicate and dangerous function*"; and if the International Harvester case[185] be understood, where a continuing business is involved, its performance is beyond the powers of the human mind. And, yet, it is just in this case alone that every citizen of the United States is to be forced to judge under the fear of ruin, fine and imprisonment. Can that be a possibility under the laws of any highly civilized people, protected by the Constitution?

As is illustrated by the latest application of the underlying principle in the able opinions of Justices McReynolds and Brandeis in the recent cases of *Oklahoma* vs. *Love*;[186] and *Ohio* vs. *Ben Avon Borough*,[187] where it was so clearly held that, in such cases, men cannot be punished for forced exercise of their judgments, unless and until they have a further and full opportunity of guidance from independent and trained jurists, and acted in defiance of it!

The riddle of the wrong construction of the Lever Act is solved, when it is once clearly understood that its real contention is that millions of men are to be forced to judge at the penalty for failure to do so of a nullification of their constitutional "*right of pursuit*"; and that, having been thus forced, the whole power of the United States is to be used to persuade twelve

---

[184] City of Knoxville vs. Knoxville Water Co., 212 U. S. 13. 1909.

[185] International Harvester Company of America vs. Kentucky, 234 U. S. 216. 1914.

[186] The Oklahoma Operating Co. vs. Love, 252 U. S. 331. 1920.

[187] Ohio vs. Ben Avon Borough. Decided by the Supreme Court June 1, 1920. Not yet reported.

other men—i. e., a jury—that the judgment citizens were thus forced to use did not accord with that of the latter; and, having done so, to ruin the former by fine and imprisonment, because of this *ex post facto* decision. And, at the best, even if these twelve men should guess with the sellers, thereby to subject these business men to endless anxiety, harassment and fear. As Lord Justice SCRUTTON says in the latest case upon this subject:[188] "Success in every action is no consolation to a "defendant, * * * and hampered by fear of such "an action in the performance of his judicial duty. The "same reason appears to me to apply to the functions "of those administering the lunacy laws."

It must be understood that under this interpretation the guessing has to be done after a removal of all the landmarks and guides, such as market price and the price resulting from freedom, that men have been instructed and accustomed to follow for centuries.

It is believed that there is no parallel for this in all history, except in the case of the daughter of Orthus, but that gives nothing but encouragement, for, from the dawn of higher civilization, she has always been held to be a monster, whose self-destruction became inevitable upon the solving of *her* riddle, and the certainty that an Oedipus must appear to remedy the cruelties involved in such an interpretation. Naturally she has been inevitably considered the emblem of Death! In the present case, of course, of "Trade."

There does not appear to be anywhere a clear comprehension of what "value" means, or consists, notwithstanding the perfectly clear and scientific statement of it by Mr. Justice HOLMES in the International

[188] 1920 L. R., 3 K. B. 197.

Harvester case;[189] and, though it can be found in the works of other able economists, one of whom well says: "What we deem the point of real value, or actual "equivalence, we speak of as market value, from the "old idea of the market or meeting place of those who "wish to make exchanges, *where competition or the "higgling of the market brings out the highest bidding "or the lowest offering in transactions of exchange.* "And when we wish to ascertain the *exact value* of a "thing we offer it at auction or in some other way sub- "mit it to competitive offers. * * * Value is thus "an expression which, when used in its proper economic "sense of value in exchange, has no direct relation to "any intrinsic quality of external things, *but only to "man's desires.* * * * For the point of equival- "ence or equation that we express or assume when we "speak of the value of a thing is a point where the "desire to obtain in one mind so counterbalances in its "effect on action the desire to retain in another mind "that the thing itself may pass in exchange from the "possession of one man to the possession of another with "mutual willingness. Now this fact that the percep- "tion of value springs from a feeling of man, and has "not at bottom any relation to the external world "* * * is what lies at the bottom of the grotesque "confusions. * * * Value has of course its origin "in the feeling of desire. *Thus it is that there is no "measure of value among men save competition or the "higgling of the market,* a matter that might be worth "the consideration of those amiable reformers who so "lightly propose to abolish competition. * * * The "law of competition is one of these natural laws, with-

---

[189] International Harvester Company of America vs. Kentucky, 234 U. S. 216. 1914.

"out an understanding of which we cannot fully under-
"stand that Intelligence to which we must refer the
"origin and existence of the world has provided that
"the advance of mankind in civilization should be an
"advance towards the general enjoyment of literally
"boundless wealth. * * * *Competition is indeed*
"the life of trade, in a deeper sense than that it is a
"mere facilitator of trade. It is the life of trade in
"the sense that its spirit or impulse is the spirit or
"impulse of trade or exchange."

From every point of view, from every source of knowledge, the improper interpretation of the Lever Act; the view that it was intended to draw the very life blood of competition simply requires a belief that an Act passed to secure adequate supplies had as its ultimate purpose such a restraining of trade itself as has never been attempted, and that would inevitably reduce all supplies to a minimum.

Another instance perfectly clarifies the distinction between the Nash [190] and the International Harvester [191] cases, that has caused such perplexity to many *outside of the Supreme Court,* though not within it. The *"discovered"* rule there involved is that men have an inherent right of adequate opportunity for self-defense; this imperatively requires a sufficient certainty of knowledge as to that which they must defend themselves against. They must be given a clear standard of conduct to follow, if they are to be justly punished for not following it. No one seems to dispute that. But what has caused the confusion is overlooking that the *"standard"* need not be in any particular statute. If it be established either by Common Law or

---

[190] Nash vs. United States, 229 U. S. 373. 1913.

[191] International Harvester Company of America vs. Kentucky, 234 U. S. 216. 1914.

a common knowledge of those involved, or so that the ordinary man should be familiar with it, it is amply and justly sufficient. But he must or should have actual knowledge from that already determined, and not from surmise or guess or conclusions upon which there be no fixed standard and different results must necessarily be reached by different minds differently circumstanced.

All this has been so long, so frequently, and so justly, and continuously announced, that one feels almost helpless at having to discuss it again. Over a century ago Mr. Justice WASHINGTON said in the Sharp case,[192] later confirmed by the Supreme Court of the United States itself: "Laws which create crime ought "to be so explicit in themselves, *or by reference to some* "*other standard* that *all* men subject to their penalties "may know what act it is their duty to avoid." See, too, the Brewer case,[193] affirming this. And this is exactly the basis of the decision in the Standard Oil,[194] the Nash,[195] and the International Harvester[196] cases, with a multitude of others.

The Lever Act is, therefore, in this respect, perfectly constitutional; for, though it names no *"standard,"* there is a well established *"standard"* that the Common Law, for perhaps a thousand years, and the Supreme Court have, again and again, announced. Each owner, as well as each purchaser, has always had the right to fix the price at which he will sell or will buy, provided only that there is no restraint of competition, no unlawful monopoly or act. The Lever

[192] U. S. vs. Sharp, Pet. C. C. 118.

[193] U. S. vs. Brewer, 139 U. S. 278. 1891.

[194] Standard Oil Company of New Jersey vs. United States, 221 U. S. 1. 1911.

[195] Nash vs. United States, 229 U. S. 373. 1913.

[196] International Harvester Company of America vs. Kentucky, 234 U. S. 216. 1914.

Act, therefore, is one of *"the instances"* of which the law *"is full,"* and its *"standard"* is one of *complete freedom,* undisturbed by unlawful restraints or monopoly, and governed alone by the results of *free competition* and the resulting *"market price."* It is, therefore, as plain as the noonday sun that what is being asked is not at all that men be punished for violating a known defined *"standard,"* of which they should have knowledge, *but for adhering to it and continuing to obey the mandates again and again given to them by the Supreme Court itself.* It cannot be conceived that there could be clearer statement of this than that so repeatedly made by the Supreme Court itself. Indeed, the decisions are but constant repetitions of the principle, not that men can be punished for undefined crime, but that the centuries old maxim: *"Id certum est quad "certum reddi potest."* So that what is really happening is that the effort is being made to establish as complete a nonsequitor as can be well imagined.

Again, we have the *"discovered"* principle, so magnificently stated in the Supreme Court's decision in the Monongahela case,[197] where it was determined, (it already being established, that the time of taking is the time of fixing the value of property), that "just compensation" means, and can only mean *"a full equivalent."* And yet it has recently been argued that by confusing "value" with "price," matters can constitutionally be so manipulated as to deprive a man of his property by but giving him the means to replace but half of it, though the whole has been taken!

Again, there is the *"discovered"* principle underlying the Connolly case,[198] but in an aspect not hereto-

[197] Monongahela Navigation Company vs. United States, 148 U. S. 312. 1893.

[198] Connolly vs. Pipe Co., 184 U. S. 540. 1902.

fore realized. Remembering the principles pointed out by Mr. Justice Holmes as to what constitutes "value," it is manifest that the unconstitutionality of this Act in this respect is not confined to the distinction between agriculturists and all other classes. Of course, all should see that it cannot accord with natural justice to hold that the drover has no untrammeled rights of determining the value of his own food cattle, nor to be guided by the results of market price resulting from free competition, whilst a farmer has both, but that the defect extends much deeper. Let us suppose that two men have saved equal sums, and one has invested his savings in horses, whilst the other, in food cattle. The man owning the food cattle is, if current contentions are correct, deprived of both the guidance of the "market price" and his own free and untrammeled judgment, whilst the owner of the horses, should the cattle owner wish to buy of him, can not only fortify himself with both, but can even call upon the District Attorney to have the other fined and jailed for doing exactly the same thing. If this be so, of what avail the fifth Amendment?

CHAPTER X.

Final Summary.

The foregoing detailed discussion has failed of useful purpose, if we have not reached a result that can be clearly and succinctly stated for ascertained truth must always tend to succinctness and simplicity of statement.

The *"discovered"* constitutional truths, may, therefore, be condensed to the following propositions, now fully established by the Supreme Court:

1st. That *"Liberty is the greatest of all rights,"* and that it cannot exist without "Life," "the pursuit of happiness," and its resulting private property, and its legitimate fruits and profits. These have, consequently, always been "unalienable" constitutional rights of every free man living under and helping to govern our free Republican nation. That property, to this extent, at least, becomes and is a synonym for "Liberty," so that wherever arbitrary governmental impairment of the *"value"* of private property is found, by "price fixing" or other despotic ukase or decree, property and constitutional liberty have been invaded—and Communistic slavery has, to that extent, been substituted for the Republican Government of free men under constitutional protection.

2nd. That all men naturally love freedom, however ignorant they may be of that eternal vigilance and the necessary measures to preserve it, and where their folly has caused them to lose it, *always try to return to it.* Liberty destroying price fixing, of necessity, an invasion of property and thus of its synonym *"Liberty,"* never can long con-

tinue without an application of the unmitigated terror established in the French Revolution, that so completely annihilated every principle of constitutional right.

3rd. That the *"just compensation"* of the Constitution consists simply *"of full and perfect equivalency of value,"* the meaning of that *"value"* must be definitely determined before *"just compensation"* can be properly understood and applied; and that that determination has, happily, been attained in a series of unvarying decisions of the Supreme Court, that absolutely settle the matters now under discussion in favor of the principles necessary to protect our Constitutional Liberty.

4th. That the *"value"* of ordinary commodities can only be determined by the results of free competition, in a free government, conducted by free men. *"Value,"* being not at all the result of any one citizen's view, desire or decree, but is that of all men, acting in a free market in free competition, in untrammeled freedom; and it is, therefore, always a matter of ascertainable fact; never of mere guess or surmise; it is a fact of the existing world; of existing conditions; never of imaginary worlds or conditions, or imaginary ideas. It is always the result, like contract, of a meeting,—an agreement of minds; not the view of one, unaccepted by another, but a result regulated solely by "the relative intensity of the desires of the whole community." *"Value"* deals only with the actual, never with imaginary conditions other than the facts. Its ascertainment is not to be compelled by peril of indictment and through guesses as to what the community would have given, but only by what it actually does give. Its ultimate determination always finally rests upon what men are willing to give for a commodity, rather than incur the exertion necessary to create it for themselves. *Value,* therefore, can no more be defined, or known than a contract can, *until an* actual and accomplished meeting

of more than one mind! It is, therefore, impossible of ascertainment until that has taken place.

5th. That *"free competition"* thus becomes a necessary constitutional, "unalienable" right of all mankind, as through it alone their other "unalienable" rights can be ascertained, protected or enforced. For men can neither measure *"just compensation"* nor reach that certain definition or *"standard"* upon which to act, without which criminal punishment can neither be just nor constitutional. And since they are entitled constitutionally to "perfect equality of value" for property taken, and clarity of *"standard,"* if charged with crime, their property cannot possibly be taken, or their Liberty destroyed by imprisonment, through the device of forcing them on behalf of a prosecuting government to guess what they and others might agree upon; their only constitutional right and guide being what has been actually and as a fact agreed upon by free men, acting in a free market and through *"free competition."* "What value determines is not how much a thing is desired, but how much any one is willing to give for it. * * * Thus it is that there is no *measure of value* among men save competition or the higgling of the market, a matter that might be worth the consideration of those amiable reformers who so lightly propose to abolish competition. It is never the amount of labor that has been exerted into bringing a thing into being that determines its value, but always the amount of labor that would be rendered in exchange for it. * * * It is not the exertion that a thing has cost in past times, that gives it value, but the exertion that its possession will in future time dispense with, for even the immediate is in strictness future. * * * The point of real value, or actual equivalence, we speak of as market value, from the old idea of the market or meeting place of those who wish to make exchanges, where competition or the higgling of the market brings out the highest bidding or the lowest offering in trans-

action of exchange. And when we wish to ascertain the exact value of a thing we offer it at auction or in some other way subject it to competitive offers. * * *"

Whilst the writer would be proud beyond measure had these immutable principles been mere original thoughts of his own, all this, most fortunately for our country, has, on the contrary, been pointed out, contended for,—even fought for, and actually achieved at least since Magna Charta, and nowhere better than by our Supreme tribunal in Monongahela,[199] Harvester [200] and Collins [201] cases, as well as the others that have already been referred to. We thus have a complete explanation of why restraints of trade and monopolies have always been said to be so pernicious; for what makes things more difficult to obtain in trade, necessarily enhances their value, and all these impediments to free trading, of necessity, increases the cost and difficulty of maintaining our life. But the remedy is not to be found by arbitrary and unconstitutional additional discouragement and impediments to trade, but solely keeping it under the spur that its regulation by free competition always best supplies. Not by making them Communistic slaves, not by the injustice of giving unequivalent return for what is taken, but by the encouragement, that perhaps more encourages production than anything else, of knowing that they will not be unjustly treated as to the results of their toil when created.

It will thus be seen that neither seller nor any jury

---

[199] Monongahela Navigation Company vs. United States, 148 U. S. 312. 1893.

[200] International Harvester Company of America vs. Kentucky, 234 U. S. 216. 1914.

[201] Collins vs. Kentucky, 234 U. S. 634. 1914.

acting subsequently can constitutionally fix *"value,"* nor be criminally punished for failure to satisfactorily perform forced attempts beyond the power of human minds. It can be clearly seen why the doctrine of *"free competition"* has always been so safeguarded, for, without it, men can never properly ascertain their constitutional rights as to their property and Liberty. It must also be understood why the Supreme Court has always insisted upon the right of both those desiring to sell and those wishing to purchase, to fix freely and in their own untrammeled discretion both what the one is willing to take and the other is willing to give, for, without this right, *"free competition"* cannot exist, nor a correct ascertainment of *"value"* be found.

All this, perhaps, may be but an instance of the adage that "Truth lies at the bottom of the well." But, nevertheless, this is the truth, and truth ascertained and declared by the Supreme Court itself. And for the purposes of interpretation, ascertained before the passage of the Lever Act, and, therefore, definitely determining the terms therein involved. It cannot be believed that these provisions will ever be departed from, much less that even, if so, men will be punished for having loyally followed and been guided by them whilst they remained in full and self-vindicating determination. If any one questions all or any of this, he is earnestly requested to show a single decision of the Supreme Court that in anywise does or has ever departed from it.

It, therefore, is not correct to say that arbitrary price fixing leads to slavery or Communism—for it is established slavery and Communism! No matter how popular such offenses against Liberty may occasionally be in times of stress, they always are, of necessity, a creation of unjust privilege of some classes against others, for they never have been, or can be, of equal

application. They are in fact but a selling of our birthright of Freedom for a mess of pottage, which in turn is withdrawn as a necessary economic effect of them; are always an offense against Liberty, which, therefore, makes it impossible that we should be too grateful to those patriots who devised the Supreme Court of the United States, that has saved us from such danger throughout all the years of the Constitution.

The answer, therefore, to our title is not that price fixing endangers Liberty; but that it absolutely obliterates it.

For these and so many other reasons it cannot, therefore, be believed that a statute can be found that can, by any possibility be construed to violate more principles of *"discovered"*—that is, as has been pointed out, eternal law, protected by our Constitution, than the Lever Act thus improperly construed; nor, indeed, that *any Act* or any conspiracy could so fatally *restrain* trade, and insure continued scarcity. Is it not, therefore, still safe to believe that *"Impius et crudelis judi-"candus est, qui libertati non favet. Angliae jura in "omni casu libertati dant favorem?"*

THE END.

TABLE OF CASES.

BIBLIOGRAPHY.

Richard T. Ely. *Outlines of Economics.*
MacMillan Company, Third Ed., 1919.

Ely and Wicker. *Elementary Principles of Economics.*
MacMillan Company,1919.

Irving Fisher. *Stabilizing the Dollar.*
MacMillan Company, 1920.

Henry George. *Progress and Poverty.*
Doubleday, Page & Company, 1916.

J. Laurence Laughlin. *Money and Prices.*
Chas. Scribner's Sons, 1919.

Henry Dunning MacLeod. *Elements of Economics.*

John Stuart Mills. *Principles of Political Economy.*
Colonial Press, N. Y., 1899.

Adam Smith. *Wealth of Nations.*
E. P. Dutton & Co., 1917.

F. W. Taussig. *Principles of Economics.*
MacMillan Company, 1920.

John Roscoe Turner. *Introduction to Economics.*
Chas. Scribner's Sons, 1919

Coke Upon Littleton. *Institutes Epil.*